

The complaint

A limited company, which I'll refer to as P, complains about the decision of ERGO Versicherung Aktiengesellschaft in relation to its commercial property insurance claim for damage caused by subsidence.

What happened

The following is only intended as a brief summary of events. P operates as a property owner, and had a commercial property insurance policy underwritten by ERGO. The policy was in force during 2016. At that time, P contacted ERGO in relation to damage to its property. Full details of this claim have not been provided. It seems that, due to damage to a drainage pipe, water had been leaking into the ground.

At the time of this claim, a report was produced by a third-party surveyor, which I'll refer to as B. It identified a number of issues with the property. This included cracking as a result of movement, rotting of timbers, and issues with the external render.

The cracking issues included internal settlement issues, but the report said that the cause of these were not known. One reason for this may have been internal changes that had been made to the property. The report identified some minor cracks, likely relating to thermal movement.

The report also identified visible settlement of a section of the rear elevation wall, which was particularly evident where the drainage pipe was located. The report said this movement was most likely related to disturbance at foundation level due to damaged below ground drainage.

Following some investigations, ERGO apparently agreed to meet the claim and paid P just over £1,600 in early 2017. It seems that this sum related largely to repairing the drainage pipe rather than to any of the other damage mentioned above.

In 2021, repair and maintenance works that were being carried out on the property revealed further damage and cracking that P considered might be subsidence related. This was located in the area of the rear elevation.

ERGO's loss adjuster, which I've referred to as F, assessed the property. By the time of F's visit, repair works had already commenced.

F's report also noted that there were issues with the internal structural integrity, which might have been from the historic internal changes. However, in relation to cause of damage being claimed for, F referred to the issues with the drainage, and said:

“Given the chalk soils, defective drainage will cause a softening and wash out of the strata, giving rise to foundation movement.

Notwithstanding this, given the clear evidence of long-term historic movements, rotten timber lintels and joist ends and debonding of pebble-dashing, then it is not straightforward that the works involved are purely subsidence related.”

ERGO then appointed a surveyor, S to assess the property. A copy of S's report has not been provided. However, ERGO has commented on the findings of this, saying S made a number of observations about B's report. S apparently went onto conclude "there is no evidence of structural cracking or movement to the rear elevation at ground level adjacent to the soil vent pipe..." Based on this, ERGO declined the claim on the basis that there had been no subsidence and that damage was caused by water penetration through the render and potentially from defective rainwater drainage, which would not be covered under the policy.

B apparently provided some further comments, saying:

"it was the movement at foundation level that undoubtedly resulted in the extent of damage to the masonry and the need for wholesale reconstruction."

And:

"there is no other possible explanation for a downward movement of the entire centre section of the rear elevation wall other than disturbance at foundation level".

However, ERGO did not change its stance. So, P complained about this decision and ERGO issued its final response to the complaint on 23 December 2022.

ERGO referred to the events in 2016 (and early 2017) and said that there had been no evidence of further damage at that time that was connected with the drainage issue. ERGO went on to say, in what would seem to be an interpretation of B's report, that the issues with rotten timbers and debonding of the render could indicate that the damage may not be solely linked to any subsidence damage. ERGO also said that the additional comments from B did not address the long-standing issues which pre-dated the policy, e.g. the cause of water ingress and the lack of evidence of subsidence at ground level.

ERGO appears largely to have not upheld the complaint on the basis that P had not responded to ERGO's initial decision on the claim in a timely manner, and so ERGO considered its final decision on the claim was reasonable in the circumstances. ERGO said that the additional comments of B were being considered.

In response to this, B provided some additional comments. It said:

"My report clearly attributes the structural damage to the rear elevation wall, as well as slopes to the rear floors and stairs, to the downward movement of the center [sic] section of the wall. My report also identifies leaking drainage at the base of this wall to be the most likely cause of the movement emanating at foundation level."

"...the movement and cracking of the structural brickwork was the primary cause of cracking and debonding of the surface render."

"Settlement of the centre section of rear wall onto which all lintels have one end bearing is the most likely cause of secondary damage to the supported brickwork and its surface applied render"

"This extent of cracking and general disruption to the brickwork could not possibly have been caused by water penetration through the surface render."

"Maintenance items are not relevant to the structural failure of the rear wall."

"...progressive movement/cracking of the elevation brickwork is the likely cause of cracking/debonding of the surface applied render. In all structural investigations such as this, it is imperative to differentiate between the 'cause' of the problem and the 'symptoms' of the problem."

And:

“The primary cause of failure of the rear elevation wall is progressive movement at foundation level caused by water leaking from the below ground drainage. Secondary damage to surface applied render and associated isolated areas of water penetration is not the cause of failure of the wall, but a symptom of failure of the wall.”

After having time to consider these comments, ERGO has since said that its position on the claim remains the same.

As ERGO did not change its position on the claim, P referred its complaint to the Ombudsman Service. Our Investigator recommended that it be upheld. He said that ERGO's conclusions were seemingly largely based on its interpretation of B's 2016 report, but that B itself had disagreed with these conclusions. So, he recommended ERGO appoint a loss adjuster (allowing P to choose between three) to produce a report which determines the cause of damage, and then to reassess the claim in line with the loss adjuster's findings.

P accepted this outcome. But ERGO did not. It said:

“...what is being demonstrated at the property is not subsidence but long-term settlement, thermal movement (cracks around windows and lintels) and deflection, where floors are coming away from walls.”

And:

“...the render (pebbledash) to the property [was] in poor condition, once this starts to crack and rainwater/ frost penetrates then internal damp issues are going to arise. Again, this isn't subsidence related but rather maintenance and it is evident from the 2016 report that the property was generally in a poor state of repair.”

As our Investigator has been unable to resolve this complaint, it has been passed to me for a decision.

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 am upholding this complaint. I'll explain why.

It should firstly be noted that the Ombudsman Service are not surveyors or experts in building construction. So, in situations like this, we rely on the evidence provided by such experts.

Much of the expert evidence provided in this case appears to be in agreement. It seems evident that not all of the repair work at the property would form part of this claim. There were issues with the maintenance of the property. And there was some minor cracking as a result of thermal movement. Whilst I am not making any finding here, it doesn't seem repair of these forms part of the current claim.

It also seems that there were issues with the internal movement that may, or may not be connected with the issues in the rear elevation. There is seemingly a possibility that water ingress, internal changes, or the movement of the rear elevation are potential causes of this damage. It would also seem that issues with the render itself could potentially be due to issues with the rear elevation, or as a general maintenance issue.

However, in terms of the rear elevation itself, B's 2016 report said that the movement here

was, “most likely related to disturbance at foundation level due to damaged below ground drainage”. ERGO’s loss adjuster then said, “defective drainage will cause a softening and wash out of the strata, giving rise to foundation movement.” And it is clear that there were issues with the drainage at this location.

S seems to have concluded that there was no evidence of movement to the rear elevation at ground level. However, this is clearly disputed by B, which says cause of the rear elevation wall issues is movement in this location. It is notable that S’s conclusions appear to largely focus on its interpretation of B’s report, conclusions B itself disagrees with. However, presumably S must have reached its conclusions on there not being movement at this location following some form of consideration.

B’s report was based on a visual inspection of the property. It seems that B has visited the property on a number of occasions. F’s report was based on an inspection described as “somewhat limited”, and that did not include close inspection of the rear elevation. It isn’t clear what level of inspection S carried out, though it does seem that a site visit took place.

Photos of damage have been provided by B. These relate to issues in 2016 and also more recently. These clearly show cracking to the rear elevation. It isn’t clear from these photos whether these issues continue down to ground level. A couple of less detailed photos have been provided by F, but these add little. No photos have been provided to support S’s conclusions.

Ultimately, based on the evidence provided, it is not clear whether the issues with the rear elevation continue to ground level or not. B has indicated they do, and has provided a reasoned explanation for why these might have occurred and for the impact this would have on the building above. S has said that there is no damage at ground level, and has ERGO said that the issues have been caused by water ingress. B disagrees that the damage shown in photos it has provided could be caused by such water ingress.

Weighing the evidence up, I am more persuaded by P’s position. The reports and comments from B are detailed and well-reasoned. They are also at least partly supported by F’s own comments. So, I do not consider ERGO acted appropriately by declining the claim – and then maintaining this position – given the evidence available.

However, even if I were to be persuaded by the evidence currently available that the issues with the rear elevation are caused by subsidence that commenced during the period of insurance, it is still not clear how much of the other damage to the property is as a consequence of this rather than other, uninsured, issues.

For this reason, I consider that a further report is needed to establish whether the cause of movement at the rear elevation is the result of subsidence and, if so, how much damage this has resulted in.

Putting things right

ERGO Versicherung Aktiengesellschaft should offer P the choice of three suitably qualified loss adjusters. ERGO Versicherung Aktiengesellschaft should then appoint and pay for the loss adjuster P chooses to produce a report to determine the cause of any movement to the rear elevation of the property, and if this is found to be a consequence of subsidence, to determine how much damage to the property this resulted in.

Once this report is produced, ERGO Versicherung Aktiengesellschaft should reassess P’s claim based on its findings.

My final decision

My final decision is that I uphold this complaint. ERGO Versicherung Aktiengesellschaft should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask P to accept or reject my decision before 26 July 2024.

Sam Thomas
Ombudsman