

The complaint

Mr and Mrs J complain QIC Europe Ltd unfairly declined their subsidence claim.

QIC's been represented by an agent for the claim and complaint. For simplicity I've referred to the agent's actions as being QIC's own.

What happened

In 2022 Mr and Mrs J noticed damage to their property where the main building joined a conservatory. They made a claim against their home insurance policy to their current insurer (D). D started investigating the damage. Based on a report by a subsidence engineer (E) it was considered cracking and other damage to the conservatory structure to be caused by subsidence resulting from shrinking soil influenced by tree root activity - beech trees in their garden. But as Mr and Mrs J had been covered by D for a short period, under an ABI agreement, it referred the claim to their previous insurer – QIC.

QIC declined the claim, relying on a 'poor workmanship' exclusion to do so. It considered the conservatory's foundations hadn't been built to a depth to meet NHBC or building regulations standards – considering the composition of the soil and presence of mature vegetation. QIC said the foundations should have been, when constructed around 2012, built to at least 1,000mm rather than 300 and 500mm as discovered by E's investigation.

Unsatisfied with QIC's response to their complaint Mr and Mrs J refer it to the Financial Ombudsman Service. They didn't accept poor workmanship as a fair reason for declining the claim. They said that reason was contrary to the opinion of various experts – including a chartered surveyor, subsidence specialist and arborist.

Our Investigator felt QIC had unfairly relied on the exclusion to decline the claim. He said it had applied standards not applicable to the building. In any event he considered the foundations to be broadly close to a depth QIC considered necessary for them to be effective. He said it's possible the damage would have happened anyway even if they had been built deeper. So the Investigator recommended QIC reconsider the claim in line with the remaining terms of the policy and pay £100 compensation. As QIC didn't accept the recommended outcome the complaint was passed to me to decide.

I issued a provisional decision. As its reasoning forms part of this final decision I've copied it in below. In it I explained why I intended to find it reasonable for QIC to say there was poor design or a defect but not – as it hasn't shown the defect to be responsible for the damage – to rely on the exclusion to decline the claim. For that reason I explained I intended to require QIC to reconsider the claim against the remaining terms of the policy. I also explained why I considered it should pay Mr and Mrs J £100 compensation. I said I would consider any comments or evidence provided in response to the provisional decision before issuing a final decision.

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.

As this is an informal service I'm not going to respond here to every point or piece of evidence Mr and Mrs J and QIC have provided. Instead I've focused on those I consider to be key or central to the issue. But I would like to reassure both that I have considered everything submitted.

Mr and Mrs J's policy covers their building against loss or damage caused by subsidence. Its accepted there's damage caused by subsidence. So I don't need to focus on that issue. Instead my main consideration is QIC's reliance on the following exclusion to decline the claim.

'Poor workmanship: lost or damaged caused by poor workmanship, use of faulty materials (including latent defects) or poor design (a latent defect is a fault which exists which only causes a problem at later stage under certain conditions).'

As it's a policy 'exclusion' it's for QIC to demonstrate its fair for it to apply it to decline the claim. I usually only consider it fair for an insurer to rely on such an exclusion if it can show that relevant standards haven't been met or, where standards don't apply, the builder failed to build a reasonable structure likely to stand the test of time – and finally that the failure is the reason for the damage.

In summary QIC's position is that the foundations being built to depths of 300mm and 500mm was poor design or a defect. Instead they should as they should have been, due to surrounding influences, built to a depth of at least 750mm.

First, I don't consider it reasonable for QIC to apply standards set by a provider of warranties for new homes when deciding if the foundation was defective. As far as I'm aware the conservatory wasn't required to be built in line with them. They aren't regulations. The builder was under no obligation to follow them.

QIC also referred to the conservatory not meeting buildings regulations requirements for foundations. Mr and Mrs J have said building regulations aren't relevant as the conservatory was exempt. QIC questioned its qualification for exemption. It raised doubts as to whether requirements for maintenance of thermal separation between the main building and conservatory and for the heating system not to be extended into it had been met. If they hadn't been met the conservatory might not be exempt from regulations.

I haven't made a finding on this point of QIC's. I don't consider it would likely make a difference to the outcome of this complaint. That's because even where building regulations don't technically apply the builder still has a duty to build a reasonable structure likely to stand the test of time and which takes into account relevant things like ground conditions and general good practise. Effectively that means if I think the foundations were reasonably, or broadly, consistent with the building regulations I'm unlikely to consider them to be defective. But based on what I've seen so far I'm not persuaded they were.

QIC's provided building regulations, approved document A clause 2E4 it considers would have applied. But its quotation appears to be of a version introduced in 2013 – so after the conservatory was built. So I've considered the version of the section that was in place when the property was built – in around 2012.

It states, except when founded on rock, strip foundations should have a minimum depth of 450mm. It adds that for shrinkable clay soils with plasticity at 10% or higher, foundations should be taken to a depth where anticipated ground movements will not impair the stability of any part of the building taking due consideration of the influence of vegetation and trees. The depth to the underside of the foundations on clay soil should not be less than 750mm, although this depth will commonly need to be increased in order to transfer loading onto satisfactory ground.

Testing, in January 2023, by E found soil below Mr and Mrs J's conservatory to be shrinkable clay – with a plasticity rating of 13%. In addition QIC's provided a 2009 photo showing the beech trees, found to be responsible for the subsidence, were already well developed before the conservatory was built.

QIC said a prudent builder would have taken account of these factors and ensured the depth of foundation would obviate any influence the trees might have. It felt building regulations required, for low shrinkage clay subsoils, a 750mm depth even before trees are considered.

Mr and Mrs J don't accept QIC's position that the foundations are of inadequate depth. They don't deny the trees were there when the conservatory was built. However, they say a surveyor said the foundations are of adequate depth. They also say an arborist and local authority officer are of the opinion the increased root growth over such a long period of time would have been impossible to evaluate over such a long period of time – around 10 years. They refer to an arborist's opinion that extended root growth was a result of climate change.

I haven't seen supporting evidence of any of these opinions. It may be that I haven't been provided with all the available reports. If Mr and Mrs J can provide any further evidence in response to this provisional decision I will give it full consideration.

Having considered Mr and Mrs J's points I'm persuaded, considering the size of the trees and the soil, it would have been reasonable to take their potential influence on the soil into account when designing the foundations. So I can't say the 300-500mm foundations were reasonably consistent with the depth the regulations outlined as a minimum – 750mm before vegetation and trees are considered. So whilst the building regulations may not technically apply, I can't say Mr and Mrs J's builder did build a reasonable structure, considering relevant matters such as local conditions and general good practice, that was likely to stand the test of time.

So I consider it reasonable for QIC to say there was poor design or a defect. But for it to rely on the exclusion it still needs to show the failure, the defective foundations, were the reason for the damage. In this case that essentially means asking would the damage have likely happened even if the foundations had been reasonably in line with the regulations.

Based on the results of his site investigations E concluded the primary cause of the subsidence and so damage appeared to be the influence of tree root activity. E said shrinkage of the underlying subsoil during the very dry weather of summer 2022 had been aggravated by vegetation. With evidence of the beech trees' roots in boreholes below the conservatory. Following E's report an arborist (I'll call A1) recommended felling of the beech trees.

I should note I've seen a second arborist (A2) report. A2 considers the beech trees to be within 'influencing distance' of Mr and Mrs J's property. But it states that without evidence in the form of root sample analysis from roots found at foundation level and

proof that clay soils are present at or below found that, vegetation can't be implicated as the cause of damage.

It seems A2's report, despite coming after E's report, was produced without sight or knowledge of it. It doesn't refer to it. It states that site investigation details weren't available at the time of the report. And it assumes an unconfirmed lack of presence of shrinkable clay – and so is likely unaware of E's borehole findings of shrinkable clay and beech roots under the foundations. As a result I haven't given much weight, in my consideration, to A2.

On balance, considering the evidence, it seems most likely the subsidence resulted from soil shrinkage below the foundations caused by the beech tree roots. But that doesn't mean the failure to build deeper foundations was automatically the cause. Having considered everything provided so far, QIC's hasn't shown it was.

I'm not currently persuaded, had the foundations been broadly in line with the regulations, that the subsidence and damage most likely wouldn't have happened. But I will consider any further evidence or comments provided on this point.

The key evidence for me is E's report. This explains roots were found directly below the foundations in two boreholes – around 300mm and 500mm. If roots weren't found at a greater depth than effective foundations would have been built to, then I might be persuaded the damage only occurred because of the defective foundations.

However, E's report is silent on the presence of roots in the deeper, 1,000mm, samples below the foundations. It doesn't explain if samples, from that depth, were tested for roots. As far as I'm aware there isn't any other evidence to support the absence of roots at or below the depth required for effective foundations.

E's report also provides some commentary on the desiccation of the soil at various depths. It's not clear, to me, that the soil at 300mm and 500mm, was more desiccated than the samples from 1,000mm. Again I will consider any further comments or evidence I'm provided with on this. Essentially, I don't think it has shown that had the foundations been dug deeper, that the subsidence wouldn't have occurred.

To conclude, whilst I currently consider QIC's made a reasonable case for its position that the foundations were defective, it hasn't done enough to show they were the cause of the damage. So I currently intend to find it was unfair for it to rely on the poor workmanship exclusion to decline the claim. That means it will need to reconsider the claim against the remaining terms of the policy.

I'm satisfied the unfair decline has caused Mr and Mrs J some unnecessary distress and inconvenience – including the time and effort committed to challenging the decision. To recognise that I intend to require QIC to pay them £100 compensation.

Mr and Mrs J welcomed the contents of my provisional decision. They didn't have any new points to make or evidence to provide.

QIC didn't accept the findings of my provisional decision. It provided several points with reference to the available evidence. I issued a further explanation in response to one of its comments. Having considered one of its comments I felt it necessary to reach an additional finding and amended my intended redress. I've copied in that reasoning and explanation below. I also asked Mr and Mrs J and QIC for any further comments in response.

'I said in my provisional decision it is 'accepted there's damage caused by subsidence'. So I said I didn't need to focus on that issue, but instead simply consider the application of the poor workmanship exclusion.

I may have misunderstood QIC's position, but I don't believe it had previously denied the existence of loss or damage caused by subsidence. It instead appeared to accept its existence – but wished to avoid liability through reliance on the exclusion. QIC appears, from its provisional decision response, to now deny the existence of subsidence damage.

As a result I consider it, to avoid further disputes, necessary to make a finding on the matter – and to amend my intended final direction.

The policy covers loss or damage caused by subsidence and heave of the site Mr and Mrs J's buildings stand on. Subsidence is defined by the policy as 'Downward movement of the ground your buildings stand on that is not a result of settlement'.

I've considered the available evidence to decide if there has been loss or damage by a cause meeting those terms. The key evidence for me is E's comments following site investigations. These included trial pits and movement monitoring.

E identified areas of damage to Mr and Mrs J's property consistent with subsidence movement and damage – primarily to the conservatory. Having considered soil investigations, from boreholes beneath the foundations of the property, he confirmed the damage to result from clay shrinkage subsidence causing the conservatory structure to rotated downwards. He said the cause of the movement is shrinkage of the underlying clay subsoils, aggravated by vegetation. In addition QIC's own surveyor, having visited the property, identified damage and gave the cause as 'ground movement'.

Based on the above, and other available evidence, I'm satisfied that there is damage or loss caused by subsidence – as defined by the policy: 'downward movement of the ground Mr and Mrs J's buildings stand on that is not the result of settlement'.

To minimise the risk of further dispute I now intend to require QIC to accept Mr and Mrs J's subsidence claim and settle it in line with the policy terms and without any reference to the poor workmanship exclusion. It will still need to pay them £100 compensation.'

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 this is an informal service I'm not going to respond here to every point or piece of evidence Mr and Mrs J and QIC have provided. Instead I've focused on those I consider to be key or central to the issue. But I would like to reassure both that I have considered everything submitted.

Mr and Mrs J didn't provide a response to my latest finding. QIC did. I've considered it alongside its earlier response to my provisional decision.

QIC doesn't accept my position. In response to my latest finding it clarified its position. It said when the issue is looked at in isolation subsidence can be suggested to be the cause of damage. However, it considers the defective foundations to be the proximate cause.

It then explained that there is 'no insured peril' as the reason for movement is the defective foundations and not ground movement. It also added that the poor workmanship exclusion applies as the 'peril' would not be operating had effective foundations been built. Essentially its position remains the same – there is subsidence damage but it wouldn't have happened had adequate foundations been built.

For the reasons set out I consider subsidence to be the cause of damage. I've accepted QIC made a reasonable case that the foundations are defective. But if it wishes to rely on the relevant exclusion it needs to show any defect made a difference – i.e. that the damage wouldn't have happened without it.

Importantly QIC didn't provide anything significant to refute the key finding in my provisional decision – that it hadn't done? enough to show the defective foundations were the cause of the damage.

I said in the provisional decision 'E's report also provides some commentary on the desiccation of the soil at various depths. It's not clear, to me, that the soil at 300mm and 500mm, was more desiccated than the samples from 1,000mm. Again I will consider any further comments or evidence I'm provided with on this. Essentially, I don't think it has shown that had the foundations been dug deeper, that the subsidence wouldn't have occurred.'

QIC's response to this is limited to stating that after many years the impact of the tree combined with the inadequate foundations has now begun to become known. There's nothing in its comments to persuade me had the foundation been built to an adequate depth the claimed for damage wouldn't have occurred.

QIC provided further copies of correspondence from E – including E's report and emails to Mrs T. It also provided A2's report. QIC asked these be given further consideration. It didn't provide any direction to what exactly I should be considering, or explain which parts support its position. As set out I've already considered that evidence. It didn't and still doesn't persuade me that had the foundations been dug deeper the subsidence wouldn't have occurred.

There is a reference from QIC to the possibility of further site investigations – including bore holes, root analysis etc. The purpose of it explaining this possibility isn't entirely clear. It may be asking for a further opportunity to provide evidence to support its position that inadequate foundations are the cause of the damage. I don't consider it would be fair or reasonable for that to happen. QIC's had plenty of opportunity to gather evidence to show it can fairly rely on the poor workmanship exclusion to decline the claim. A line must be drawn somewhere to allow the complaint to be resolved.

So based on the above, and other available evidence, I'm satisfied that there is damage or loss caused by subsidence – as defined by the policy: 'downward movement of the ground Mr and Mrs J's buildings stand on that is not the result of settlement'. Whilst I consider QIC's made a reasonable case for its position that the foundations were defective, it hasn't done enough to show they were the cause of the damage. So I find it was unfair for it to rely on the poor workmanship exclusion to decline the claim.

To minimise the risk of further dispute I require QIC to accept Mr and Mrs J's subsidence claim and settle it in line with the policy terms and without any reference to the poor workmanship exclusion. It will also need to pay them £100 compensation.

My final decision

For the reasons given above, I require QIC Europe Ltd to accept Mr and Mrs J's subsidence claim and settle it in line with the policy terms and without any reference to the poor workmanship exclusion. It will also need to pay them £100 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs J and Mr J to accept or reject my decision before 25 December 2024.

Daniel Martin
Ombudsman