DRN-4887722

The complaint

Mr D and Mrs T complain that Society of Lloyd's (SoL) declined a subsidence claim made under their unoccupied property insurance policy.

Where I've referred to SoL, this includes the underwriting syndicate which actually provides the cover under Mr D and Mrs T's policy.

What happened

Mr D and Mrs T have an unoccupied property insurance policy with a SoL syndicate for a property they own. The policy has been renewed several times.

In September 2022 Mr D and Mrs T reported cracking to the property to SoL. Investigations were carried out into the cause of the cracking, and it was concluded to be subsidence caused by root induced clay shrinkage, exacerbated by moisture demand of nearby vegetation.

However, the claim was subsequently declined. This was on the basis that SoL said when taking out and renewing the policy, Mr D and Mrs T hadn't declared the property was suffering cracking, or that it had tall trees in close proximity. SoL said that if this had been disclosed, they would have added an endorsement which excluded damage caused by roots and trees, so they retrospectively added this and declined the claim.

Mr D and Mrs T were unhappy with the claim declinature and approached the Financial Ombudsman Service.

One of our investigators looked into things but he didn't uphold the complaint. He ultimately said that even putting the question about cracking aside, Mr D and Mrs T didn't declare the trees in close proximity when asked and he thought they should have. So, he said under the relevant insurance law, SoL had fairly retrospectively added the endorsement and declined the claim.

Mr D and Mrs T provided several responses disagreeing, but they didn't change the investigators' overall view of things. So, Mr D and Mrs T 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.

Whilst I appreciate it will come as a disappointment to Mr D and Mrs T, I've reached the same outcome as our investigator.

I'll also explain that I don't intend to comment on every event that occurred, or every argument presented. Instead, I'll focus on the points I consider key when reaching my final decision. I don't mean this as a discourtesy, instead it reflects the informal nature of this service and my role in it. But I'd like to assure both parties that I've considered all the information, comments and arguments they've provided when reaching my final decision.

Following Mr D and Mrs T reporting cracking to the insured property, investigations were carried out into the cause on a without prejudice basis. Ultimately, it was concluded that the cracking was being caused by subsidence as a result of deep-seated root induced clay shrinkage, exacerbated by the moisture demand of nearby vegetation.

Subsidence was one of the listed 'perils' under the insurance policy. However, SoL declined the claim on the basis that they said incorrect answers to questions asked had been given by Mr D and Mrs T at policy inception and/or in the subsequent renewals. SoL said that if they had been given the correct answers, they would have added an endorsement to the policy and wouldn't have provided cover for subsidence damage caused by tree roots. So, SoL retrospectively applied this endorsement and declined the claim on this basis.

The relevant law in this case is The Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA). This requires consumers to take reasonable care not to make a misrepresentation when taking out (and renewing) a consumer insurance contract (a policy). The standard of care is that of a reasonable consumer.

And if a consumer fails to do this, the insurer has certain remedies provided the misrepresentation is - what CIDRA describes as - a qualifying misrepresentation. For it to be a qualifying misrepresentation the insurer has to show it would have offered the policy on different terms or not at all if the consumer hadn't made the misrepresentation.

CIDRA sets out a number of considerations for deciding whether the consumer failed to take reasonable care. And the remedy available to the insurer under CIDRA depends on whether the qualifying misrepresentation was deliberate or reckless, or careless.

Mr D and Mrs T's policy documents also highlighted the importance of correct information being given, for example:

> *"IMPORTANT NOTICE*
>
> *Please check this document or schedule*
>
> *DISCLOSURE*
>
> *You are reminded that this document is based on the information you have provided us and this information forms the basis of the insurance contract. You must notify your broker without delay of any incorrect information or if any amendments are required. If you do not do so, your insurance cover may not protect you in the event of a claim and your insurance may be invalidated.*

You must take reasonable care to provide complete and accurate answers to the questions we ask when you take out, make changes to, or renew your policy."

And:

"When you take out, amend, or renew your policy, we will ask various questions that are relevant to us accepting the risk of insurance, and on what terms. When you answer those questions, you are required to take care not to misrepresent any information and to give us all the information you are asked for. If you give us incorrect or incomplete information the wrong terms may be quoted, we may be entitled to reject payment of a claim, or payment could be reduced. In certain circumstances your policy might be invalid and you may not be entitled to a refund of premium."

SoL says Mr D and Mrs T failed to take reasonable care not to make a misrepresentation when taking out and renewing the insurance policy. SoL says Mr D and Mrs T didn't declare that there were tall trees in the vicinity of the insured property and cracking to it. I'll consider both separately below.

Cracking

I've looked at Mr D and Mrs T's insurance documents, and in particular the most recent ones from the renewal prior to the claim being made (although previous documents also say the same). These outline the question in relation to cracking and answer given to it:

Is the insured property free from cracking?	Yes

Mr D and Mrs T say they only noticed external cracking to the property shortly before the claim was made, which is after the renewal date. And they assumed any historic internal cracking was due to age related plaster cracks as the property hadn't been redecorated in a significant amount of time. When investigations were completed into the cause of the subsidence, it was noted in the loss adjuster report:

"Mr D is mindful that many of the fractures maybe (sic) historic in origin, but over time these fractures have increased in size and he is now concerned about the amount and extent of the fractures. The movement and damage has therefore been reported to the insurer."

So, this seems to indicate historic cracks were present and noticed by Mr D and Mrs T, at least internally, but despite the question asking about cracking generally, not just external cracking, the answer they'd given to the question was that it was free from cracking when they already recognised it wasn't.

However, it is difficult for me to conclude with certainty at what point the cracks were noticed, and consequently if, and at what point, Mr D and Mrs T failed to take reasonable care not to make a misrepresentation when answering (or not amending) the answer to this question. Regardless of this though, the claim hasn't been declined by SoL solely on the basis of the cracking and the answer given to the question about this. And I'm satisfied that even putting this question about cracking to one side, the claim has still been fairly declined on the basis of the trees question alone. I'll explain why below and will focus on the trees question, rather than the cracking.

Trees

I've looked at Mr D and Mrs T's insurance documents, and in particular the most recent ones from the renewal prior to the claim being made (although previous documents also say the same). These outline the question and answer given to it surrounding tall trees:

Are there any trees within 7m (22ft) of the insured property and are over 5m (15ft) in height?	No

During claim investigations, the loss adjuster noted:

> *"Within the front garden there are a number of large mature trees.*
>
> *These are:*
>
> *Conifer tree that sits close to the left hand boundary. The tree is approximately 8-10m tall and is 4.0m away from the front elevation of the house.*
>
> *Eucalyptus tree that sits close to the left-hand boundary (left of the drive) and is approximately 12-15m in height and is around 10m away from the front of the house. There were a few stumps noted within the front garden where trees had been felled and removed.*
>
> *In the public footpath there was a deciduous Highways tree, which stood around 15-20m tall and was around 15m away from the front elevation of the house.*
>
> *Within the rear garden there are:*
>
> *Conifer tree that is approximately 3-4m tall and stands 4m away from the rear of the house.*
>
> *A Willow tree that is approximately 15m tall and is around 20m away from the rear elevation."*

So based on this, I think it's clear there were tall trees present, of which at least one met those specifics in the question. Despite this, the answer to the question was answered by Mr D and Mrs T as *"no"*.

Mr D and Mrs T argue that when the policy was first taken out, the trees in the vicinity hadn't reached the heights and requirements mentioned in the question, so they didn't declare these. However, I've seen street view images of the property, and I don't think these support that argument. Instead, they show trees of significant height, and within close proximity to the property in the images taken in 2012, 2014, 2015, 2018, 2019 and 2020.

In any event, this answer was still noted as *"no"* in the 2022 renewal, which was closest to the claim. So regardless of the previous policy years, I'm satisfied Mr D and Mrs T failed to take reasonable care not to make a misrepresentation at the point of renewal, prior to the claim.

Mr D and Mrs T have argued that they wouldn't have known about the roots from the trees, but that isn't the question being asked. The question asked was about any trees, rather than roots, and I think that question was clear. And I think by answering this *"no"* (or not correcting that answer) Mr D and Mrs T failed to take reasonable care not to make a misrepresentation.

So, I'll now consider whether the misrepresentation Mr D and Mrs T made is a qualifying misrepresentation under CIDRA. To answer this question, I need to establish what SoL would have done if Mr D and Mrs T hadn't made the misrepresentation.

SoL has provided confirmation from a senior underwriter that had SoL been aware of the tall trees in close proximity, they would have applied the following endorsement on the policy:

> *"ORW0023 - TREE DAMAGE EXCLUSION ENDORSEMENT*
> *It is hereby noted and agreed that this insurance EXCLUDES any loss or damage resulting from trees including damage caused by roots."*

As SoL would have done something differently had the misrepresentation not been made, I'm satisfied Mr D and Mrs T's misrepresentation was a qualifying one.

Whilst not referred to specifically by SoL, as they've retrospectively applied the endorsement that they would've introduced but for the misrepresentation, I'm assuming they've treated the misrepresentation as careless. I say this because if they considered it reckless or deliberate, then following the available remedies under CIDRA they'd be entitled to avoid the contract, refuse all claims and retain the premiums paid. But they've not done that.

Treating it as a careless misrepresentation, rather than deliberate or reckless, is more favourable to Mr D and Mrs T, and I'm satisfied SoL has acted fairly by treating it as a careless misrepresentation. So, I've gone onto look at the actions SoL can take in accordance with CIDRA.

CIDRA outlines that in the event of a careless misrepresentation, where there is a claim, and the insurer would have entered into the contract on different terms, the contract can be treated as if entered into on those different terms.

As outlined, if the misrepresentation didn't occur, then SoL would have included the above tree damage policy endorsement. So, following the remedies available under CIDRA, SoL is entitled to retrospectively add this. And as the subsidence is being caused by tree roots, and any damage caused by trees including roots is excluded, I'm satisfied SoL has fairly declined the claim.

Mr D and Mrs T have argued that it wasn't the roots of the tree's on their property which has caused the subsidence, and instead it was the tree on the street outside owned by the council. And they say other properties on the street have had similar issues from other council owned trees, and other property owners' insurers have assisted in their claims.

However, I'm afraid that doesn't change the decision I've reached here. I've considered what would have happened had the misrepresentation not occurred, and that is that the endorsement would have been added. This endorsement doesn't just apply to trees on the property, or owned by Mr D and Mrs T, and instead all trees. Whilst other insurers may have dealt with claims for their policyholders, I can't comment on that as I don't know the terms of their policies, whether they declared trees etc. Instead, I'm limited to Mr D and Mrs T's claim and complaint, and for the reasons outlined, I don't think SoL has acted unfairly.

Mr D and Mrs T have said that they shouldn't be penalised for an innocent oversight, and they didn't do this deliberately. However, SoL hasn't treated the misrepresentation as deliberate, and instead careless, and I'm satisfied that is fair. Whilst it may have been an innocent oversight, that doesn't change the fact that if SoL was made aware, they would have done something different. And the relevant law (CIDRA) allows them to apply the appropriate remedy outlined in this, which is what they've done, and I'm satisfied that's fair.

Mr D and Mrs T say by declining the claim, this could amount to abuse of contract by SoL, an unfair contract term and that SoL are trying to avoid their contractual duties under the policy by imposing their own contractual terms. However, as explained by our investigator, SoL hasn't imposed its own contractual terms, and instead they have followed the relevant law in this type of case, CIDRA, and in doing so, I don't think they are acting unfairly.

SoL has now provided the investigation reports completed to Mr D and Mrs T, which outline the conclusions on what is causing the subsidence. It is up to Mr D and Mrs T to decide if they wish to try and pursue the council directly for removal of the trees (or losses and/or the property damage).

My final decision

It's my final decision that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D and Mrs T to accept or reject my decision before 31 July 2024.

Callum Milne
Ombudsman