

The complaint

Mr and Mrs V complain that Royal & Sun Alliance Insurance Limited (RSA) applied an unfair policy term to incorrectly decline their subsidence claim. Any reference to RSA in this decision includes its respective agents unless specified otherwise.

What happened

The background of this complaint is known in detail to the parties involved, so I've summarised what I've found to be the key points.

- Mr and Mrs V have an ongoing subsidence claim with RSA that's spanned across several years. They've made multiple complaints to RSA about its handling of the claim, but this decision only considers Mr and Mrs V's complaint, addressed in the March 2023 final response letter (FRL), that RSA has unfairly declined their claim by relying on what they believe to be unfair contract terms, causing significant distress and upset as well as further avoidable delays.
- RSA upheld Mr and Mrs V's complaint in part. It agreed there'd been delays and poor service on its part since the last FRL that was issued in August 2022. But it maintained its position on the claim decision. It said an engineer report confirmed that the extension foundations didn't meet the required standards which led to the subsidence occurring. RSA said damage of this nature is excluded under the policy.
- However, RSA said this should've been apparent to it much sooner than it was, but a miscalculation by its contractor resulted in attempts to progress the claim on the mistaken understanding it was covered by the policy, and this shouldn't have happened.
- To recognise the impact of its mistakes, RSA offered £600 compensation for the delays, £2,500 for the misleading information about the claim and £200 in recognition of a previous delayed payment. Unhappy with RSA's response Mr and Mrs V brought their complaint to this Service.
- Our Investigator upheld their complaint in part. She didn't think RSA had shown it could fairly rely on the exclusion it had to decline Mr and Mrs V's claim as she didn't think the design standards it said hadn't been complied with fairly applied.
- The Investigator also found that the tree roots said to be causing the subsidence were found below the required foundation depth RSA say applied. So, she concluded that even if Mr and Mrs V's extension did adhere to the standards in question, it's likely subsidence still would've occurred, meaning the foundation depth was unlikely to be the cause of the damage being claimed for (subsidence).
- The Investigator said that RSA should therefore consider the claim and progress it in a timely manner. But she thought the compensation already offered was more than fair and so she didn't recommend that this be increased any further. And she didn't find the contract terms to be unfair, so she didn't think RSA needed to do anything further in relation to this.
- Both RSA and Mr and Mrs V disagreed with the Investigator's findings. RSA

maintained the design standards it sought to rely on fairly applied and said the fact that the offending tree roots were found below the required foundations didn't mean that subsidence would have occurred regardless.

- Mr and Mrs V maintained that the contract terms were ambiguous, unintelligible, and introduced a significant imbalance to the contract and so therefore were unfair. And they requested that an independent professional be appointed at RSA's expense to oversee their claim. The case was passed to me, an Ombudsman, to decide.

I issued a provisional decision on this case, part of which is included below:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Throughout the course of this complaint, several points have been made. And I've carefully and fully considered what Mr and Mrs V and RSA have said. But in line with this Service' informal approach, I won't address every point raised, instead I'll focus on what I see as being the crux of the matter and the key outstanding issues following our Investigator's assessment of this complaint, as well as deciding if RSA has dealt with Mr and Mrs V in a fair and reasonable way.

The damage caused to Mr and Mrs V's extension was found to be the result of subsidence caused by clay shrinkage exacerbated by nearby trees. Cover is available for subsidence under Mrs and Mrs V's policy, but it's subject to certain exclusions and limitations.

The terms of Mr and Mrs V's policy state that damage caused by, "poor or faulty design, workmanship or materials" is excluded under the cover available. Mr and Mrs V think this is an unfair term. I don't agree the term itself is unfair. Buildings insurance generally doesn't cover damage of this nature, therefore, it's an exclusion we see in most policies like this and isn't unusual. In any case, I think what's more relevant here, is how the term was applied to Mr and Mrs V's claim and whether this was fair.

From what I've seen, RSA doesn't think the depth of Mr and Mrs V's extension foundation complies with Building Regulations and so this amounts to poor or faulty design. It's therefore relied on the exclusion above to decline the claim. But in order to do this, the onus is on RSA to show this exclusion fairly applies.

To support its argument, RSA has referred to guidelines by a builder of new homes, N. But N's guidance only applies when construction is under the supervision of N as part of a new home. From what I've seen so far, that wasn't the case for Mr and Mrs V's extension. So, the extension didn't need to comply with N's guidelines and they're not relevant here. There's been some discussion about whether the damage would still have occurred had the foundation been built to N's guidelines. But since those guidelines don't apply, I don't think further consideration needs to be given to this point.

It's not in dispute that the extension was subject Building Regulations. And Mr and Mrs V have been able to provide a copy of the Building Regulations Completion Certificate for the extension in question. This suggests that Building Control approved the extension foundation and considered it compliant with the applicable regulation at that time.

That leads me to conclude it was satisfied that relevant Regulation and guidance was satisfactorily considered. And, having received sign off from the relevant authority, I'm satisfied Mr and Mrs V took appropriate steps to ensure the extension was built to the right standard. I don't think they could reasonably be expected to do more than this.

With all that in mind, I'm not currently persuaded in this case that RSA has shown the

foundation was defective or that the damage was as the result of poor or faulty design, workmanship or materials. Therefore, based on what I've seen so far, I don't think it can fairly rely on the exclusion it has to decline the claim. To put things right, I'm minded to direct RSA to now accept Mr and Mrs V's subsidence claim.

RSA has offered compensation totalling £3,300 for the delays, distress and inconvenience its actions have caused in this case. Based on what I've seen so far, I'm satisfied this is more than fair in the circumstances and so I don't intend to direct RSA to increase this any further.

Mr and Mrs V have raised further points, including another policy term that they think is unfair and a request for an independent party to be appointed to handle the claim.

From what I've seen, the other policy term relates to when a claim is paid, which hasn't happened yet, so I won't be considering this further as I don't think it's relevant to the case I'm answering in this decision. With regards to an independent professional, Mr and Mrs V raised this in a previous complaint which was addressed and responded to in a separate final decision issued by another Ombudsman at this Service. Therefore, I won't be making a finding on this again."

Mr and Mrs V accepted the provisional decision, but RSA did not. It reiterated its position that the extension foundations didn't comply with the relevant building regulations, and it said Mr and Mrs V had breached a policy requirement.

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.

RSA has reiterated its position that Mr and Mrs V's extension didn't comply with the relevant building regulations at the time. But as already explained, Mr and Mrs V have a Building Regulation Completion Certificate which essentially says otherwise. This certificate is provided by the relevant authority on the matter. And it demonstrates to me that Mr and Mrs V took the appropriate steps to make sure the extension was built to the right standard. I still don't think they could reasonably be expected to do more in this case.

RSA has also said that during the time it had accepted liability for the claim it offered to remove trees at Mr and Mrs V's property but was prevented from doing so. It says this is a breach of the policy requirement that measures must be taken to prevent or mitigate damage and so the claim should fail as a result. From what I've seen, up until now, this hasn't been the reason RSA has focused on to decline the claim. And it's disappointing that it's now sought to do so at such a late stage.

Mr and Mrs V's policy states that if policy conditions aren't met RSA may reject *or reduce* a claim payment. So, it's worth noting that declining the claim isn't the only potential outcome. And from what I've seen, RSA hasn't provided any further explanation or reasonable supporting evidence as to why it thinks a claim decline is applicable in this case. And I'm satisfied it's had ample opportunity to do so.

In any case, I don't think it would be fair or reasonable in all the circumstances of this case to decline or reduce Mr and Mrs V's claim for this reason. On its own, Mr and Mrs V pausing the tree removal while they had concerns, and there was an ongoing dispute and complaints raised with the business (and our service) doesn't persuade me that there's been a breach of a policy condition in this case. And from what I've seen, the proposed remedial works have also been impacted at times by several avoidable delays on RSA's part.

With all that in mind, and on balance of everything I've seen in this case and what I think is fair and reasonable in all the circumstances, I'm still not persuaded that RSA can fairly rely on the exclusion it has to decline Mr and Mrs V's claim. It must now put things right as set out in my direction below.

My final decision

For the reasons set out above, I uphold this complaint in part.

Royal & Sun Alliance Insurance Limited must now accept Mr and Mrs V's subsidence claim for the extension and progress it in a timely manner. It must also pay Mr and Mrs V the offered compensation amount of £3,300* if it hasn't done so already.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr V and Mrs V to accept or reject my decision before 13 September 2024.

**RSA must pay the compensation within 28 days of the date on which we tell it Mr and Mrs V accept my final decision. If it pays later than this, it must also pay interest on the compensation from the deadline date for settlement to the date of payment at 8% a year simple.*

Rosie Osuji
Ombudsman