DRN-5164560

The complaint

V, a limited company, complains about Ageas Insurance Limited's (Ageas) handling and settlement offer following a claim made under its commercial manufacturer's insurance policy.

V is being represented in its complaint by Mr V, one of its directors. As Mr V engaged throughout the claim with Ageas and the various parties involved, I'll refer to Mr V throughout where appropriate. However, to be clear, the limited company V is the policyholder and eligible complainant in this case, rather than Mr V himself in an individual capacity.

Where I've referred to Ageas, this also includes the various parties involved that were acting on Ageas' behalf.

What happened

V is a specialist food manufacturer and has a commercial manufacturer's insurance policy underwritten by Ageas. This includes cover for buildings damage, and various other aspects of cover including machinery, liability and goods.

There were two escapes of water from pipes at V's factory on separate occasions around three months apart. Temporary repairs were carried out including the diversion of the pipes. However, the flooring in the factory below the freezer started to crack so V made a claim to Ageas.

Ageas appointed a loss adjuster, and it was agreed that the flooring was cracking due to the previous escapes of water. It was agreed between V and Ageas that the repair works would be delayed in order to allow for V to build up stock so it could continue to supply products during the repairs period, in order to mitigate business interruption and losses.

The loss adjuster asked Mr V on behalf of V to provide quotes for repairs and once obtained, he submitted them to the loss adjuster. Due to the extent of damage and costs of repairs, a structural engineer was appointed by Ageas, who I'll refer to as A. Following the appointment of A, it was suggested there should be some amendments to the quotes Mr V had obtained. The repair quote was accepted, and Mr V arranged for works to be carried out.

During the repair works Mr V raised concerns to A about additional issues and damage identified. Following discussion with A, some amendments were made to the flooring repairs, and the remainder of works continued.

Following completion of the repair works, multiple issues with the factory appeared, including doors being misaligned, leaning walls and cracking internally and externally. A inspected the reported issues and gave their view on these. Ultimately Mr V wasn't satisfied with the conclusions that there were no structural issues and he asked if V could appoint its own structural engineer for a second opinion, which was agreed.

V appointed its own structural engineer who I'll refer to as B. They said that there had been a failure to identify the extent of the frozen water underground or the potential impact of this when it thawed, and this led to further avoidable damage occurring. And B suggested three different options to repair the factory long term, which were extensive and would be significant.

A site visit meeting went ahead with all parties involved from both V and Ageas. Ageas didn't agree the repairs recommended by B had been evidence or were required. Ultimately Ageas said that Mr V on behalf of V failed to identify the frozen water and potential thaw issues before the initial repair works were completed, despite being advised by A to do so. So Ageas said V is responsible for the later damage occurring, and that their structural engineer had limited involvement in identifying the issues or repairs required.

Following this there were various offers of settlement made by Ageas, which I'll comment further on below. But ultimately, V says the settlement offer made for the repairs isn't enough and shouldn't be capped at the policy limit as it says Ageas is responsible for that limit being reached, and V is unhappy that Ageas has sought to limit the period for a business interruption claim.

Ageas doesn't agree they acted unfairly, and they say that it was Mr V, on behalf of V, that failed to ensure the original works were sufficient and that led to what has happened since.

Following communication between all parties, V submitted a claim for costs in excess of £785,000. This included, amongst other things, costs for Mr V's time managing the claim, V's legal fees incurred after appointment of solicitors, costs to relocate the factory so extensive repairs can be completed, V's structural engineers' fees, and the full cost of the repairs required as recommended by B.

Following discussion, Ageas made a final offer comprised of the following:

- Buildings – Sum insured £251,505
- Previously agreed Increased cost of working £13,945.32
- Notional loss of Gross Profit £44,000
- Contribution towards solicitor's costs £10,500
- Total £319,700.32

And in an attempt to resolve matters, Ageas rounded this up to a final offer of £325,000. V didn't accept the settlement offer and asked the Financial Ombudsman Service to review matters.

One of our investigators looked into things but she didn't uphold the complaint. She said that Mr V was managing the claim and he didn't follow the guidance given by A to complete trial holes to consider the presence of ice and future potential impact of this, and this resulted in the extent of damage not being identified before the original reinstatement works commenced. And this then led to the later damage occurring when the ice thawed. Therefore, the investigator said she wasn't persuaded Ageas was responsible for this.

The investigator also said that she noted B had given three options to create an effective repair, but she said they hadn't demonstrated this was necessary. She concluded that Ageas' settlement offer of £325,000 was reasonable in the circumstances.

The investigator also said, in response to a separate complaint point, that its likely V's premium was higher due to the claims made, but the claim was recorded correctly as an escape of water, rather than subsidence as V had said.

V didn't agree so the case was passed to me to decide.

I reached a different outcome to our investigator, so I issued a provisional decision to give both parties an opportunity to comment on my initial findings before I reached my final decision. Before I outlined my provisional decision to both parties (which I've included below), I also explained and clarified the following points about the award limit of this service, and the claim history and what I'd be commenting on.

Our award limits

The claim was made to Ageas in April 2019 and V has made complaints to Ageas after that. And V then referred its complaint to the Financial Ombudsman Service in October 2023. So, our award limit for that time is £415,000.

This means that where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £415,000, plus any interest and/or costs/interest on costs that I consider appropriate. If I think that compensation is more than £415,000, I may recommend that the business pays the balance, but the business wouldn't have to do what was recommended.

Ageas paid for the original initial works. That was accepted at the time as sufficient for the works themselves as the issues that later presented weren't apparent, so that amount, for that time, is not in dispute.

However, V is now claiming in excess of £785,000 to include costs it says were incurred in addition to the original works required and agreed and costs associated with what V says is required to now put things right. Ageas has made a settlement offer of £325,000 which hasn't been accepted and remains in dispute.

However, whilst V is claiming for in excess of £785,000, I'm not directing (or recommending) it pay this. I'm also not deciding if £325,000 is a fair settlement offer either, as for the reasons explained below, that simply isn't possible based on the information provided.

Instead, I intend to direct Ageas to do further investigations in order to consider whether further, more extensive, repairs are needed. Once the investigations are complete, Ageas will need to obtain a schedule of works in order to determine what works they think are required.

At that point, Ageas will be able to outline to V whether this supports its current offer or make a revised offer. And if there is a dispute over the settlement offer amount following this, this would be a new complaint in which the actual settlement amount, for the actual works required, could be considered taking into account the additional evidence.

I'll explain why I'm intending to reach this outcome further below.

The claim history and what I'll be commenting on

It's important here that I outline the Financial Ombudsman Service is an informal dispute resolution service. As both parties are already aware, this claim has been lengthy, complex, with various parties involved, including:

- Mr V on behalf of V
- Two different solicitor firms appointed by Mr V on behalf of V
- Different structural engineering firms appointed by Mr V on behalf of V (including B)
- A loss adjuster on behalf of Ageas
- Various structural engineers on behalf of Ageas (including A)
- The wider loss adjusting firm appointed by Ageas who appointed the structural engineers (including A) and relevant senior individuals
- Ageas's solicitor

And the communication between all parties has been significant, there has been overlapping communication, including various responses concurrently from each party and those they have appointed.

Since the complaint has been with this service, both Mr V on behalf of V, and V's solicitor have been simultaneously corresponding with this service, presenting various arguments, points and recollections. However, whilst I note this, I don't mean this as a criticism, as I'm aware of the impact this claim has, and could continue to have, on V.

But I wanted to mention this as I don't intend on commenting on every event, argument or point that has been presented by the various parties. I don't mean this as discourtesy, instead it reflects the informal nature of this service and my role in it. Instead, I intend to focus on the some of the key points, in reaching an outcome which is fair and reasonable in the circumstances of the case, and a way forward that is fair and reasonable to both parties. Having said that, I'd like to reassure all parties that I've taken into account all the information they've provided when reaching my provisional decision.

What I provisionally decided – and why

In my provisional decision, I said:

> *"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.*
>
> *Who was managing the claim?*
>
> *V made the claim to Ageas after cracking to the freezer floor appeared following escapes of water at the insured premises. The core of the complaint and what has happened leading up to that stems from who was responsible for determining the extent of the damage at the outset and identifying any potential issues that could arise following this, as damage later presented which likely could have been at least in part avoided. And the cost of repairing this could be beyond the policy sum insured.*
>
> *Ageas argues that Mr V was managing the claim and was responsible for failing to identify the extent of damage, frozen ice and the potential future issues that may arise when the ice thawed. Ageas says their structural engineer (A) was only involved to the extent of validating what V was claiming for.*

Mr V argues that he was only acting on V's behalf as that was the only option presented to him, but he was relying on A, as the professional and structural engineer, to guide him on what should be included in the claim, including identifying the extent of damage and potential future issues.

So by contrast, Ageas has argued that A's role in the claim was solely to validate the scope and costs that V was claiming. Whereas Mr V said he believed that A was there to support and guide him on V's claim and repairs.

On balance, I can see why Mr V was under this impression. An email from the loss adjuster to Mr V dated 3 December 2019 said:

> *"In this respect the engineer will be able to assist with the planning and scheduling of the works."*

And an email from the loss adjuster to Mr V dated 11 December 2019 advised:

> *"As advised previously I am happy for (A) to liaise with the contractors during your absence should this be necessary and to, also, oversee the works when they are carried out in January."*

This implies A was there to assist with planning, scheduling and overseeing the works required.

A also confirmed to Ageas later in the claim (my emphasis added):

> *"I response to your query regarding terms of engagement, I can confirm that we **did not** write to Mr V outlining our terms of engagement."*

Mr V also contacted A a number of times during the early parts of the claim when he identified cracking to the structure, and concerns with the flooring reinstatement. A visited and gave guidance on the flooring needing a slightly different repair method to include metal bars, which was then carried out. And A's view was that the cracking to walls wasn't structurally important so repairs could continue, which they then did.

So, I can see why Mr V was under the impression that A was guiding him on matters, including the repairs required.

It is also important to note that the loss adjusting firm that appointed the structural engineer, A, on behalf of Ageas also wrote to Mr V and said (I've highlighted some of the key parts):

> *"As I said when we met, given the complex nature of the claim, and what we now know, it clearly would have been better for you to appoint your own construction consultant to assist you with all of the technical issues and procurement of the repair works…"*

> *"(the loss adjuster) reported these problems to Insurers, and he was requested by Ageas to appoint a structural engineer to assist you with these resolution of these difficulties, and hence introduced (A). In hindsight, a better course would have been for us to have advised Ageas that the consultant should be chosen and appointed by the Policyholder, and asked that you find someone suitable to represent you. However, we did not do this."*

And:

> *"Whilst we can apologise to you for the present situation on behalf of Insurers, as we could have been clearer, I believe that the offer to provide you with technical assistance was well intentioned and not designed to restrict your claim in any particular way…*
>
> *We similarly have no doubt that (A) is a very experienced and expert structural engineer. His introduction and assumed appointment by Insurers, rather than you by yourself as the client, left (A) with a mixed responsibility as follows:-*
>
> - *This was divided between giving technical advice on the scope and method of repairs to your contractor without any contractual design responsibility*
> - *(A) possibly may have felt obliged to make judgements regarding the extent of work based on what he believed might be covered by the insurance policy, rather than from a solely technical structural engineer's viewpoint.*
>
> *It is acknowledged that neither of these two outcomes are ideal, but the fact is we are where we are now, and need to look for a means of concluding the matter by repairing the structure of the property, so you can have confidence in the integrity of the building going forward."*

And they further said:

> *"It seems that (the loss adjuster) was perhaps not made fully aware by (A) of the decision made and implications of the covering over of the cracks. This should have been reported to (the loss adjuster) for consideration and this may have lead to a realisation that it might have been better to keep the factory closed whilst the further repairs could be completed. I have discussed this matter with (A) and he feels the decision made was, to some extent, also agreed by you but I am not taking any sides as clearly I was not a party to the discussion and I do not think it would be sensible or productive to dwell on this any further."*

So, the loss adjusting firm that appointed A also agree with Mr V that A's appointment and responsibilities were blurred.

Whilst Ageas, via their solicitor and other parties, seem to have moved back from this position later in the claim, I'm persuaded the above supports what I think is most likely the case. So, whilst Mr V was heavily involved in the claim, I don't think A's involvement was made clear and can see why Mr V was under the impression A would be guiding him on matters, including the works required and potential issues that might be present that needed to be explored.

Mr V also gave A drawings he had completed of the various areas of flooring temperature hot spots which had led him to discover there were escapes of water in the first place. So, A would have been aware of the extent and areas of leaking pipes and the potential for the water to have spread. It is also important to note that Mr V was an inexperienced individual in commercial escape of water insurance claims, he isn't a structural engineer, and is a director of a food manufacturing company. By contrast, A was a structural engineer who presumably was appointed to this claim due to expertise in this field.

Mr V also says that he was only heavily involved due to that being the only option presented to him, he wasn't told at the outset, despite the policy covering it, that he could arranged for experts to act on V's behalf instead. And it seems this is accepted by Ageas' loss adjusters, and this situation could've been avoided if Mr V, on behalf of V, had been informed accordingly.

So, I think the early stages of the claim were unclear in terms of A's role and responsibility and can see why Mr V was under the impression A could have, and should have, done more.

Who should have identified the potential for ice heave and future damage?

It was later accepted that there was ice heave due to extensive amounts of ice being undetected and present under the flooring when the initial repairs were completed, which hadn't been taken into account in the repair schedule or works. And this then caused movement in the building when it thawed, after the initial repairs had already been carried out. This has led to damage that needs to be repaired which is potentially extensive and structural. Had the extent of ice below the slab been identified earlier, it seems to be accepted by all parties, this could have been avoided. Mr V also says there are voids likely in the flooring as a result of the ice, which need putting right along with the structural building repairs. And this is what V's structural engineer, B, has presented three options to rectify.

Ageas says Mr V should have identified the extent of ice below the insulation and accounted for this when submitting quotes and arranging initial works. And they say A told Mr V about the potential for this and what he needed to do. Whereas Mr V argues he wasn't given this guidance, and this should have been identified by A as a potential issue, given he'd already provided drawings of where hot spots were in the floor where the water had escaped and spread.

As I've said, I don't think A was clear in the limits of their role and can see why Mr V was under the impression A was guiding him on V's claim. The difficulty I have here though is that there were on site discussions which I wasn't party to. And Mr V and A have given differing versions of what was said. So, I need to decide on balance what is most likely have occurred and who was most likely responsible for this not being identified before the works were completed.

A has said that they informed Mr V that he'd need to carry out trial holes in order to assess the depth of the screed and to check the slab for moisture content and the effects of freezing. And this position has also been outlined in follow up correspondence from some of Ageas' agents during later communication, including from Ageas' solicitors, when they have held Mr V responsible for what happened. Ageas says that if Mr V had completed the trial holes as suggested by A then it's likely the extent of frozen water under the floor would have been discovered and the later damage that occurred could have been prevented. Therefore, they say Mr V is responsible, and the extent of their liability is the claim and policy limits regardless of the cost of putting that right.

However, Mr V disputes that he was told this was needed and instead says he was only told to complete the trial hole for the slab depth. He says he was under the impression that A was the expert so should have been aware of the potential for the presence of ice, and the risk when it thawed. So, he says A should have told him he'd need to carry out further investigations and to check for the effects of freezing and the extent of water that may be present.

Like I say, I don't know exactly what was discussed at the site visits. But having reviewed all the remaining information, I haven't seen any reference to Mr V being told about taking into account the effects of freezing or trial holes to check for the extent of frozen water. Instead, the email to Mr V from A actually said:

> *"(floor repairing company) have allowed for an average screed depth of 35mm. You indicated that the existing screed may be 50-60mm. I would suggest that trial holes are undertaken before the works commence as the additional screed depth could affect both the costs to remove and replace and the timescale to complete the works."*

And:

> *"You should check with (floor repairing company) whether the moisture content of the existing concrete slab will affect the installation of the bonding primer and screed. The slab could be checked when the trial holes above are undertaken."*

So, it appears the guidance Mr V was given was to check the screed depth, which he did, but no reference or guidance to check for the potential for frozen water below or the effects of this.

With the above in mind, unless anything changes as a result of the responses to my provisional decision, I'm minded to conclude that A's lack of clarity about their role in the claim resulted in Mr V being of the understanding they were giving him guidance. And this then resulted in the extent of pre-works investigations not being completed to check for frozen water and this then being taken into account during repairs, which then resulted in the later damage occurring.

So, I don't agree with Ageas that Mr V on behalf of V is solely responsible for not identifying the potential for ice heave, or consequently for the later repairs that were required as a result of this happening.

<u>Settlement offered and the additional repairs required</u>

V has obtained its own structural engineers (B's) report. This outlined what they considered led to the further damage including:

- *Failure to establish if the ground was still frozen before undertaking work*
- *Failure to consider the effect of freezing water and what happens when it thaws, such as leaving voids*
- *Absence of a geotechnical investigation*
- *No contract drawings or schedule of work*
- *No work to stitch the cracks in the walls or to stabilise the ground below foundation level*

B suggested the following could occur in the future:

- *The ground has been disturbed by the freezing action of the water*
- *The ground will recompact and settle resulting in downward movement*
- *Movement may not be even and is likely to crack the walls and floor slab*

B outlined the immediate works they deem required including:

- *Repairs to the base of the timber stud walls*
- *Replacement of the freezer floor slab, screed and finishes*
- *Geotechnical investigations*
- *Rectifying the cracks, tiles, and roof structure due to the movement*

And B suggested three options as a long-term solution to stabilise the building:

1- *Demolish the building and reconstruct the foundations on a suitable bearing strata*
2- *Piling the existing ground floor slab and walls*
3- *Resin injection to reconsolidate the soil*

B suggested option one would be the ideal solution. So, V has argued that the most effective way to carry out repairs is to demolish the building and rebuild it, which would require full relocation of the factory to complete. And it is this that it has based most of its claim for in excess of £785,000 on.

By contrast, Ageas says the extent of works required isn't actually fully known as there hasn't been conclusive evidence provided by B of voids under the flooring, so B hasn't shown that any of the three options presented are actually necessary. And Ageas say the cracking is superficial and can be repaired within the settlement they've offered, without the need for relocation of the factory. So, Ageas has said the policy limit of £215,505 is sufficient. Whereas V is seeking costs as outlined and it says the policy limit shouldn't apply on the basis it was Ageas' lack of actions that led to the position it is now in.

As I said above, I'm not minded to conclude it was due to V's failures that the potential for ice heave went unaccounted for and resulted in consequential damage. I'm persuaded, on balance, that this was due to the lack of clarity of A, as the expert, in their role, and what they were guiding V on and to what extent. So, if as a result of A's failings, the cost to put right the later damage that occurred as result of this exceeds the policy limit, then I don't think in principle that it would be fair to apply that strict policy limit. This is because it isn't a claim as such under the policy and subject to the policy limits, it is compensating the equivalent costs to put that avoidable damage right, outside of the policy terms and limits.

But that doesn't mean I'm going to direct (up to my award limit - or recommend beyond that) Ageas pay the costs that V has submitted at this stage, or conclude that the policy limit (and what's been offered) isn't sufficient to complete repairs in any event. I'll explain why.

Quite simply, what is required to put right that ice heave damage and to affect a lasting and effective repair isn't known at this stage. As an informal dispute resolution service, my role isn't that of a structural engineer and it isn't to decide what will or won't create a lasting and effecting repair. Instead, I consider what the experts involved say, and what is fair and reasonable in all the circumstances of the case.

However, Ageas' experts, and B appointed by V, have differing views on the extent of damage and required works for a lasting and effective repair. And at this stage, I'm not persuaded that B has sufficiently evidenced the significant works and three options proposed are actually required.

I say this because the reason for their suggestion is on the basis there may be voids under the floor as a result of the ice and heave, and to create an effective repair these would need to be considered and rectified, which would involve a full factory shutdown and extensive works. But at this stage that's not conclusively been shown as required, and instead is a potential. By contrast Ageas argues the cracking is superficial and can be repaired without the need for factory shutdown, but that isn't known without knowing exactly what has happened under the flooring and if voids or other issues exist.

So, on the one hand, I can't reasonably conclude that B's suggestions are what is most likely required in order to rectify this and create a lasting and effective repair, as the current evidence doesn't support that. But equally on the other hand, I can't reasonably conclude that Ageas' settlement offer is fair either, given that is also an opinion, without the evidence to conclude there definitely isn't voids.

Where there is conflicting views on matters, we may consider on balance which is most persuasive and most likely, but there are also occasions where this simply isn't possible. And I don't think the evidence conclusively supports one view more persuasively than the other here, they are both to an extent speculation based on opinion. And the potential difference in sums, and detriment to either party, and what is involved, could be significantly more or less depending.

However, what is clear from both experts is that to determine this, further investigations are needed to establish if the ground has thawed, the impact of this and the potential for future movement. So, at this stage, that, I think, is a fair way to move things forward. Unless anything changes as a result of the responses to my provisional decision, I'll be directing the following as the next steps to move things forward:

- *Investigations should be carried out to establish whether the ground has thawed, the impact this has had on the structure including ground underneath, if there are voids present, and the potential for future issues*
- *Once investigations are concluded, a schedule of works for a lasting and effective repair should be compiled for both parties to further review*

Given there is the potential to send the claim and repairs one way or another, with a significant variation in costs and potential detriment or costs to either party, independence is important in the investigations carried out.

So, I think that it would be fair and reasonable for Ageas, as the insurance expert, to present three options of independent experts to carry out the investigations and schedule of works. V would then be able to choose one of these to produce the independent report and schedule of works for both parties. And once this is obtained, both parties will need to consider the content of it and what is required to put things right.

To be clear here though, I'm minded to conclude that it was A's lack of clarity that led to V being under the impression they were providing guidance, which then led to the ice heave and damage, which likely could have been avoided. So, I'm minded to conclude that the investigations and report should be funded by Ageas.

If a further dispute arises over what is a reasonable settlement at that point once investigations and a schedule of work are complete, then V would be free to raise a new complaint about that, to take into account the independent report. And if an agreement can't be reached on what is a lasting and effective repair, V would also be able to refer a new complaint to this service in line with our usual rules and timescales. But V should also take into account our award limits, as what is required and associated costs may or may not be above our award limit, but at this stage that's unknown.

Project management costs

Mr V has submitted, as part of the claim, costs for project managing the claim in excess of £40,000. He says that he wasn't told of any other option but to project manage the claim himself, despite the option under his policy to have professionals involved on V's behalf

When Mr V submitted his claim, the costs were initially declined by Ageas. But later, in a letter from the loss adjuster, £10,700 was offered.

Mr V is unhappy with this, as he says he told Ageas throughout that he'd be claiming for his time, and they didn't tell him that he wouldn't be able to, alongside not telling him he could appoint someone else to manage things and this would be covered by the policy.

I can see various emails from Mr V to the parties involved letting them know he'd be submitting a claim for costs of his time. And I can't see that Ageas or parties acting on their behalf told him he wouldn't be able to claim for these until they were formally submitted.

Mr V is claiming an hourly rate of pay for his time. He says that due to the claim management, he was unable to grow V's business, or carry out his usual separate business interests outside of V which were his second source of income.

However, as outlined above, Mr V isn't the eligible complainant in this case as he isn't the policyholder, V is. So, I can't award Mr V personally for his time as an individual based on an hourly rate, or for time he's spent away from his other business outside of V.

I could make an award if there was a financial impact to V as a result of Mr V being unable to carry out his usual role at V as a director, and if that caused a quantifiable actual financial loss to V – the eligible complainant. But Mr V has said his time as a director is spent growing the business. And that can't be financially quantified as a loss to V as a result of him not being able to fulfil his usual director duties, and doesn't equate to an hourly rate in any event. So, I won't be awarding Mr V an hourly rate of pay for the time he's asked for totalling in excess of £40,000. Ageas had already made an offer of £10,700 for Mr V's time, and because he isn't an eligible complainant, it's not for me to decide whether he should be paid more, as an individual, for his time.

Mr V has also claimed an hourly rate for his assistant. But again, it isn't quantified how that detrimentally impacted V or caused V, the eligible complainant, a financial loss. So, I won't be recommending an additional hourly rate for Mr V's assistant.

Legal costs

Mr V has claimed around £20,000 for his legal representation throughout the claim (with two solicitors at different times during the claim). Ageas has already offered £10,500 towards this. I don't intent to direct Ageas to pay more than this.

I recognise Mr V felt the need to appoint legal representation in order to try to move things forward. But I can also see that Mr V was corresponding with Ageas and the various parties involved alongside this and at the same time, his solicitor wasn't solely representing him, and he was very much still involved in the claim and communication. Ageas didn't appoint solicitors until much later into the claim when they made their final offer of settlement, and prior to this Mr V and his legal representative were corresponding with the loss adjuster and structural engineers involved.

Whilst I recognise that there were some movements on the claim after V's solicitors were involved, such as the underinsurance element where the position changed, I can't reasonably conclude the claim only progressed to the position it did solely due to the appointment by V of legal representation. And of course, V could have approached this service to consider matters, as an informal and free dispute resolution service instead, without the need for legal representation or costs.

So, unless anything changes as a result of the responses to my provisional decision, I don't intend to direct Ageas to pay V's full legal representation costs, or to direct it to increase the amount offered already (£10,500).

Structural engineer costs

V appointed B to provide a report on the extent of damage that I've talked about above. V has submitted a claim for B's costs in excess of £12,000 for work already carried out including completing the report.

Whilst Ageas agreed that V could appoint a structural engineer, they asked for details of this in order to consider this further, before appointment was made. V didn't provide this and went ahead without confirmation from Ageas, and then submitted costs based on hourly rates after.

I don't intent on directing Ageas to cover these full costs. This is because I don't think they've been sufficiently quantified as fully necessary, and they were incurred without approval from Ageas.

Ageas agreed to a structural engineer report, which has been completed, but it isn't clear how the costs were calculated based on hourly rates. It always would have taken time to complete and write up the report, but it's unclear to me why the report went through seven drafts from being carried out in June 2021 before being completed, after the seventh draft, in December 2021. I assume much of the hours claimed were to do with the seven redrafts of the report over that extended time.

And it hasn't been shown what were actually necessary costs incurred in producing that report, and the report, whilst mentioning what B thinks needs to be done in order to complete a lasting and effective repair, I'm not persuaded that's actually been evidenced for the reasons outlined above.

With this in mind, I don't intend on directing Ageas to cover B's full fees. However, if the further investigations do reveal what was suspected (but not evidenced) by B, and what they thought would be needed for an effective repair, then Ageas should consider whether to include the reasonable fees that would have been incurred in producing that report.

If a later dispute rises about Ageas' decision whether to cover B's fees (or the amount they deem reasonable), V would be free to make a new complaint at that point.

Business interruption

Ageas has sought to apply the policy limit of 18 months for a business interruption claim. They say the claim was made in April 2019 so the liability period expired in October 2020. However, Ageas has later said they'd be willing to extend this by six weeks to allow for the repairs they think are required (rather than those suggested by B).

However, at this stage I can't say whether that position is fair. And that's because it isn't clear at what stage there would be business interruption or how this would impact V. I say this because until the required repairs are known (if my proposal for a way forward remains the same in my final decision), it isn't clear exactly how or what would be required to put things right, or how long that would take. It also isn't clear if V would be able to build up stock to mitigate losses like it did previously.

Mr V has also said that V may not continue to operate as it currently doesn't as a food manufacturing business and he may convert the building for other uses, in which case there wouldn't be any business interruption in any event.

But until the extent of repairs are known, and Mr V's intention for the building and if V will continue to operate as is and if stock can be built to mitigate losses, this simply isn't known. So, I don't intend to make a finding on this, or if the extended timescale limit proposed by Ageas is fair or reasonable.

Instead, once investigations are concluded and a schedule of work is drawn up, then both parties will need to discuss matters at that point. And if an agreement can't be reached, then V would be able to raise a new complaint about that.

But I will also add one observation here, Ageas has sought to apply the 18-month limit time which is the indemnity period under the policy from when the claim was first made in April 2019 to October 2020 and it has said this starts from when the claim is made. Whilst the claim was made in April 2019 initially, the claim was placed on hold to minimise losses with agreement from Ageas' loss adjuster for a period of around eight months, and they confirmed:

> *"That's fine, I understand you are extremely busy and I've no problem with works being delayed until January.*
>
> *My only concern is that, if costs for the works aren't presented until January, there could have been an increase in the interim. Strictly speaking Insurer's wont be able to consider such an increase.*
>
> *Hopefully there won't be a significant increase and it will be simple for us to agree overall costs."*

And whilst this delay was agreed by the loss adjuster, it doesn't appear that V was made aware that the business interruption period would continue to run during this period and effectively be using up the 18-month time limit which could significantly impact what V would be able to claim.

So, whilst I haven't made a finding on this for the reasons outlined, I've simply highlighted an observation which Ageas may wish to take into account at a further stage.

How the claim is recorded

V says it has been 'blacklisted' from obtaining subsidence cover elsewhere due to the claim being incorrectly recorded by Ageas as subsidence. I haven't seen any evidence which demonstrates this is the case. Ageas has confirmed the claim is recorded as an escape of water, rather than subsidence, and this is correct as that's what the claim was for. Ageas also confirmed that the policy premium increased in 2019 due to the escape of water claim.

Ageas has also said that since that point, a successful claim was also made in March 2021 by V for a cracked septic tank.

So, I won't be directing Ageas to do anything further here."

Therefore, I was minded to uphold the complaint in part and to direct Ageas to:

- Carry out (and pay for) investigations to establish whether the ground has thawed, the impact this has had on the structure including ground underneath, if there are voids present, and the potential for future issues

- To facilitate this, Ageas will need to provide V with the details of three suitably qualified independent experts, and V will need to choose one to undertake this

- Once investigations are concluded, a schedule of works for a lasting and effective repair should be compiled for both parties to further review

The responses to my provisional decision

Ageas responded and said they noted and accepted what I was intending to direct them to do regarding the appointment of an independent expert to carry out further inspections and report on the issues.

However, Ageas maintained that V was responsible for managing the claim and identifying the works required.

V responded and it didn't agree. V provided extensive correspondence, arguments and submissions. V argued that Ageas had twisted the facts and outlined what it says happened, and what should have happened in its view.

V ultimately maintains that Ageas should be paying the full costs they've submitted, including the repairs they say are required and associated costs.

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.

I've thought carefully about the provisional decision I reached, and the responses to it. Having done so, my final decision remains the same as my provisional decision.

Ageas' response to my provisional decision

Ageas accepted what I said I was intending on directing in the provisional decision regarding the appointing and reporting on the issues by an expert.

However, Ageas said they elected indemnity settlement rather than reinstatement, and the works and contract were managed by V. So, they say they aren't responsible for defective remedial works and the primary responsibility lies with V. Whilst Ageas has referred to defective works being the responsibility of the builder that carried them out and/or V, the issue here has presented due to the lack of consideration of ice heave and future damage before the works were then carried out.

Ageas reiterated the role of the engineer that was appointed on their behalf, that I referred to as A, was to check the scope and costs for indemnity on their behalf only. And they say that the fact V was under the impression A was engaged to do something he wasn't engaged to do, or his role or responsibilities weren't spelled out, doesn't alter that position. They say any lack of clarity doesn't make them responsible, and instead would be a matter between V and A, not Ageas.

However, I discussed this in detail in my provisional decision. And my view on this remains the same. I included quotes from communication between the parties where V was told the engineer would be there to assist with *planning and scheduling* of works, along with *overseeing the works*. A also visited and advised on the repair method, and that cracking wasn't important, and was an expert in this field, rather than Mr V on behalf of V.

And as I outlined (and quoted at length) in my provisional decision, it seems that the lack of clarity was already accepted by the firm appointed by Ageas, that then appointed A, to handle matters on their behalf.

Ultimately my view on the sections *Who was managing the claim?* And *Who should have identified the potential for ice heave and future damage?* remain unchanged from my provisional decision. So, it also follows that what I said in the section titled *Settlement offered and the additional repairs required* remains the same too:

> *"As I said above, I'm not minded to conclude it was due to V's failures that the potential for ice heave went unaccounted for and resulted in consequential damage. I'm persuaded, on balance, that this was due to the lack of clarity of A, as the expert, in their role, and what they were guiding V on and to what extent. So, if as a result of A's failings, the cost to put right the later damage that occurred as result of this exceeds the policy limit, then I don't think in principle that it would be fair to apply that strict policy limit. This is because it isn't a claim as such under the policy and subject to the policy limits, it is compensating the equivalent costs to put that avoidable damage right, outside of the policy terms and limits."*

Nothing Ageas provided in response to my provisional decision has led me to reach a different conclusion to that outlined in it. So, I'll now go on to address V's response to my provisional decision.

V's response to the provisional decision

Firstly, I'll outline that in response to my provisional decision, V provided a 24-page letter, along with around 120 pages of attachments. The letter covered previous arguments, timelines and points raised, along with V's different views on particular paragraphs from the provisional decision. V also referenced in a number or places where it didn't agree with Ageas and why, including where I'd summarised both sides of an argument from both parties. V has also gone into detail about what it says should have happened at various places during the claim, in particular the early parts.

The extensive attachments V provided were in order to put forward similar, or the same arguments, previously presented at various different points. And at points where I'd summarised things, V has also gone into details about the background to the points that I'd summarised.

I explained at the start of my provisional decision that I didn't intend on commenting on every individual argument or point presented. And that this reflected the informal nature of this service and my role in it. And I focussed on key points, whilst briefly summarising others. So, whilst I may have chosen in places to briefly summarise things, that doesn't mean I was unaware of what had happened. So, whilst I appreciate V has sought to expand on these summarised areas, I'd already taken into account all the information previously provided when summarising it.

So, to reconfirm, we are an informal service. And I recognise V has provided extensive information, attachments, arguments and submissions both before the provisional decision and in response to it. But I won't be commenting on every argument, event or point that has been raised before or in response to my provisional decision. However, I'll again confirm that I've taken into account all the information provided by both parties when reaching my final decision, on what I consider is fair and reasonable in all the circumstances of the case.

Whilst recognising V's extensive response to my provisional decision, the arguments presented (albeit in a different format or variation) have largely been made before, so were already taken into account when reaching my provisional decision. Therefore, I'll only now be commenting on V's responses where I think it is needed in addition to what I said before, and I'll use the same headings as those in my provisional decision.

I'll also highlight here that V has, at various points, referred to what it says a court would conclude and tell Ageas to pay. And V has previously indicated that it may take Ageas to court, and it was only V's solicitors that suggested coming to this service in the first instance. Of course, if V is unhappy with the outcome of this complaint and my final decision, then it doesn't have to accept it. It is for V to decide itself whether to take Ageas to court if it thinks the court will give it the outcome it wants, or a better outcome than I'm directing.

I also acknowledge V has pointed to a typo in the provisional decision (under heading *Settlement offered and the additional repairs required*) where I've referred to £215,505. To confirm, this should be £251,505.

Who was managing the claim?

V has gone into detail about what happened, its view of what should have happened in the early stages of the claim, and the role and responsibilities of Ageas' engineer that I've referred to as A throughout.

However, in my provisional decision, I already agreed that I can see why V was under the impression A was guiding it on the claim. And I also outlined paragraphs from the firm (on behalf of Ageas) that appointed A which seem to agree that things were unclear. I also recognised that Mr V on behalf of V had provided drawings of various areas of floor temperatures, and I said that A would have been aware of the areas of leaking pipes, and they were the experienced structural engineer in these circumstances.

I concluded that:

> *"So, I think the early stages of the claim were unclear in terms of A's role and responsibility and can see why Mr V was under the impression A could have, and should have, done more."*

And my views on that remain unchanged.

Who should have identified the potential for ice heave and future damage?

V has gone into detail, again, about why A should have identified this. However, I already said in my provisional decision that despite Ageas' (and A's assertion) that Mr V was told to explore the effect of freezing, I didn't agree the evidence supported that is what took place and explained why. And I concluded:

> *"So, it appears the guidance Mr V was given was to check the screed depth, which he did, but no reference or guidance to check for the potential for frozen water below or the effects of this."*

And I provisionally concluded:

> *"…I'm minded to conclude that A's lack of clarity about their role in the claim resulted in Mr V being of the understanding they were giving him guidance. And this then resulted in the extent of pre-works investigations not being completed to check for frozen water and this then being taken into account during repairs, which then resulted in the later damage occurring.*
>
> *So, I don't agree with Ageas that Mr V on behalf of V is solely responsible for not identifying the potential for ice heave, or consequently for the later repairs that were required as a result of this happening."*

And my views on that remain unchanged.

Settlement offered and the additional repairs required

V has responded to the provisional decision and advised that whilst the initial claim including costs it was claiming was for £785,000, these costs will now have increased due to the time that has passed. V also argues that it wasn't the party that suggested demolishing the building.

V seems to accept what I said about under the floor, and the presence of voids being unknown without investigation. But V argues the rest of the works and issues to the main structure are known and were already agreed, so it says I should direct Ageas to pay up to the award limit, and recommend it settle the rest, with V's costs included, regardless of the flooring being unknown.

I went into detail in my provisional decision about this. And my views and final decision on this point remain the same. But I'll add some further information below where I think it is helpful.

Ultimately on one hand V says I should direct Ageas to pay for the works and associated costs as these are already known, but on the other hand, V says the costs will have increased. And I don't agree with V that all, or part of, the costs are known. V is relying on previous discussions early in the claim, but things have moved on since then. And V is already aware that since then, there is a dispute about what works are actually needed.

As I explained, as an informal dispute resolution service, my role isn't that of a structural engineer and it isn't to decide what will or won't create a lasting and effective repair. And Ageas and V have differing views on what will create a lasting and effective repair. I summarised my position on this in my provisional decision, and my position on that remains unchanged:

> *"I say this because the reason for their suggestion is on the basis there may be voids under the floor as a result of the ice and heave, and to create an effective repair these would need to be considered and rectified, which would involve a full factory shutdown and extensive works. But at this stage that's not conclusively been shown as required, and instead is a potential. By contrast Ageas argues the cracking is superficial and can be repaired without the need for factory shutdown, but that isn't known without knowing exactly what has happened under the flooring and if voids or other issues exist.*
>
> *So, on the one hand, I can't reasonably conclude that B's suggestions are what is most likely required in order to rectify this and create a lasting and effective repair, as the current evidence doesn't support that. But equally on the other hand, I can't reasonably conclude that Ageas' settlement offer is fair either, given that is also an opinion, without the evidence to conclude there definitely isn't voids.*
>
> *Where there is conflicting views on matters, we may consider on balance which is most persuasive and most likely, but there are also occasions where this simply isn't possible. And I don't think the evidence conclusively supports one view more persuasively than the other here, they are both to an extent speculation based on opinion. And the potential difference in sums, and detriment to either party, and what is involved, could be significantly more or less depending."*

So my position on a way forward for the claim remains the same as I explained in my provisional decision, including:

> *"However, what is clear from both experts is that to determine this, further investigations are needed to establish if the ground has thawed, the impact of this and the potential for future movement. So, at this stage, that, I think, is a fair way to move things forward. Unless anything changes as a result of the responses to my provisional decision, I'll be directing the following as the next steps to move things forward:*
>
> - *Investigations should be carried out to establish whether the ground has thawed, the impact this has had on the structure including ground underneath, if there are voids present, and the potential for future issues*
> - *Once investigations are concluded, a schedule of works for a lasting and effective repair should be compiled for both parties to further review"*

I recognise that V says this presents further uncertainty for it, but as I said in my provisional decision, I'm not persuaded the evidence supports one view more conclusively than the other and there is a significant potential difference in sums and potential detriment to either party, and what is involved, could be significantly more or less. So, I remain of the view that this is a fair way forward in the first instance.

I said that given the potential significant costs and potential detriment, independence in investigation was important. Therefore, I outlined:

> *"…I think that it would be fair and reasonable for Ageas, as the insurance expert, to present three options of independent experts to carry out the investigations and schedule of works. V would then be able to choose one of these to produce the independent report and schedule of works for both parties. And once this is obtained, both parties will need to consider the content of it and what is required to put things right."*

And I said this should be funded by Ageas. In response to my provisional decision, Ageas accepted this. However, V said:

> *"...it would be fairer for there to be 2 investigators, one appointed by them and one chosen by us, but for them to pay for both."*

I don't agree this would be a fair way forward. By having two separate experts acting on behalf of each party providing reports, if they reach differing views, effectively that leaves the claim in exactly the same position as it already is, with conflicting views from each party.

So, my position on a fair and reasonable way forward remains the same as outlined above.

Of course, if either party disagrees with the findings of the report, then it would be down to that party to decide whether to obtain their own report (at their own costs) to counter that. And I also outlined in my provisional decision:

> *"If a further dispute arises over what is a reasonable settlement at that point once investigations and a schedule of work are complete, then V would be free to raise a new complaint about that, to take into account the independent report. And if an agreement can't be reached on what is a lasting and effective repair, V would also be able to refer a new complaint to this service in line with our usual rules and timescales. But V should also take into account our award limits, as what is required and associated costs may or may not be above our award limit, but at this stage that's unknown."*

Project management costs

Mr V maintains that his submitted costs for managing the claim should be paid. Mr V has consulted his accountant after receiving the provisional decision for their view on things.

In my provisional decision, I said:

> *"Mr V is claiming an hourly rate of pay for his time. He says that due to the claim management, he was unable to grow V's business, or carry out his usual separate business interests outside of V which were his second source of income.*

> *However, as outlined above, Mr V isn't the eligible complainant in this case as he isn't the policyholder, V is. So, I can't award Mr V personally for his time as an individual based on an hourly rate, or for time he's spent away from his other business outside of V."*

On one hand Mr V's accountant seems to disagree and says that Mr V was acting on behalf of V, but then later says it is strange that Ageas aren't paying for *your own* time.

But to confirm, for the purposes of an eligible complainant to bring a complaint to this service, the policy is in the name of V as a limited company, not Mr V as an individual. So it is V that is the eligible complainant here in this case and I can't award Mr V personally for his time based on an hourly rate, or time away from his other business.

I did outline in my provisional decision:

> *"I could make an award if there was a financial impact to V as a result of Mr V being unable to carry out his usual role at V as a director, and if that caused a quantifiable actual financial loss to V – the eligible complainant. But Mr V has said his time as a director is spent growing the business. And that can't be financially quantified as a loss to V as a result of him not being able to fulfil his usual director duties, and doesn't equate to an hourly rate in any event."*

And a quantifiable financial loss to V, the eligible complainant, still hasn't been demonstrated.

In copies of communication between Mr V and V's accountant that were provided, there is some discussion about the potential for Mr V to bill V for his time. But it hasn't been evidenced V (the eligible complainant) has been billed for Mr V's time, so that's not happened here, and my position on this point remains as outlined in my provisional decision:

> *"So, I won't be awarding Mr V an hourly rate of pay for the time he's asked for totalling in excess of £40,000. Ageas had already made an offer of £10,700 for Mr V's time, and because he isn't an eligible complainant, it's not for me to decide whether he should be paid more, as an individual, for his time."*

I should add here that I also said:

> *"Mr V has also claimed an hourly rate for his assistant. But again, it isn't quantified how that detrimentally impacted V or caused V, the eligible complainant, a financial loss. So, I won't be recommending an additional hourly rate for Mr V's assistant."*

But Mr V said to his accountant:

> *"Further to this Ageas did pay (assistants name) fees so he's got that completely wrong and sets a president (sic)."*

I was under the impression (from V's arguments and extensive documentation) that this hadn't been covered by Ageas, but if it has then that aspect of the claim appears resolved, so I don't need to comment on this further. But to be clear, that doesn't mean I'll be directing Ageas to pay Mr V's submitted costs for his time, for the reasons outlined above.

Legal costs

V maintains that Ageas should be paying its full legal costs. My position on this remains the same as outlined in my provisional decision, so I won't repeat that in full here. In summary I won't be directing Ageas to increase the amount it has already offered towards this (£10,500) for the reasons already explained.

But I should add, V has said in response to my provisional decision:

> *"My lawyers recommended that we contact the Financial Ombudsman service."*

So, it appears that V wasn't intending on approaching this service but for advice received from its legal representatives later in the claim, so it appears V was always intending on using legal representation which would have incurred costs.

Structural engineer costs

V maintains that Ageas should be paying its full structural engineers (referred to as B throughout) costs. However, my position on that remains the same as in my provisional decision.

I said in my provisional decision that whilst Ageas agreed that V could appoint a structural engineer, they asked for details before appointment was made. And I said that this wasn't provided, and V went ahead without confirmation from Ageas and then submitted costs on an hourly rate after. It seems that V accepts they were appointed without Ageas' confirmation as it has said:

> *"(previous legal representative) appointed (B) without agreeing fees we changed solicitors to (current legal representative) because of this error"*

V also says that its structural engineer has accounted for their time and provided invoices. But this doesn't give a full breakdown, and my view remains the same that it is unclear why the report went through seven drafts between June 2021 and being completed in December 2021, which presumably added to the costs being claimed for. In fact, the invoice for this period, aside from two site visits simply says:

> *"Expert witness work"*

With various hours against it over the six-month period.

My position on this remains the same as outlined in my provisional decision, and I won't be directing Ageas to cover B's full fees.

However, I also said:

> *"With this in mind, I don't intend on directing Ageas to cover B's full fees. However, if the further investigations do reveal what was suspected (but not evidenced) by B, and what they thought would be needed for an effective repair, then Ageas should consider whether to include the reasonable fees that would have been incurred in producing that report. If a later dispute rises about Ageas' decision whether to cover B's fees (or the amount they deem reasonable), V would be free to make a new complaint at that point."*

Business interruption

My position on this remains the same as outlined in my provisional decision, and for the same reasons so I don't intend on repeating that in full here.

But in summary, it isn't known what or if there will be business interruption, because that in part depends on the intention for the business, and the extent of works required. I said:

> *"But until the extent of repairs are known, and Mr V's intention for the building and if V will continue to operate as is and if stock can be built to mitigate losses, this simply isn't known. So, I don't intend to make a finding on this, or if the extended timescale limit proposed by Ageas is fair or reasonable."*

Whilst I haven't made a finding on this for the reasons outlined in my provisional decision and above, I also highlighted an observation which Ageas may wish to take into account at a further stage and said:

> *"Instead, once investigations are concluded and a schedule of work is drawn up, then both parties will need to discuss matters at that point. And if an agreement can't be reached, then V would be able to raise a new complaint about that."*

How the claim is recorded

V maintains that it has been 'blacklisted' from obtaining subsidence cover due to Ageas incorrectly recording the claim as subsidence.

I said in my provisional decision that I hadn't seen any evidence that this was the case, and Ageas had instead confirmed the claim is recorded as escape of water, rather than subsidence, and that was correct as that was what the claim was for.

V has provided information which it says supports its allegations that the escape of water claim has been wrongly recorded. But I'm still not persuaded this has been demonstrated.

V's broker said there were two claims recorded and outlined these. An *Escape of Water* which is the claim in question was listed as the first claim, and a second claim from 2021 where it says *Sceptic (sic) Tank Split*. Directly underneath the listed septic tank split claim, it says *because of ground movement*.

So, this doesn't demonstrate the claim in question, the escape of water, has been recorded as subsidence, and instead the septic tank is recorded as being split due to *ground movement*. The septic tank claim isn't the subject of this complaint or my consideration, so I can't say whether that is right or wrong. But I do note V said in communication:

> *"Also, the second claim this year for the damaged treatment plant was down to excess water washing away the subsoil and aggregate around the tank…"*

So, this appears to tie in with the listed claim for a split septic tank, due to *ground movement*.

V's broker also said:

> *"As your current insurer were not inviting your renewal, because of claims losses within the last 12 months…"*

And within the last 12 months was the claim for the septic tank. The broker also said:

> *"I have had unfortunately several Insurers declining to quote due to the recent large claim and outstanding claim…"*

So, I'm not persuaded that it's been shown Ageas has incorrectly recorded the escape of water claim as subsidence, and from the brokers communication, this shows the claim is recorded as *Escape of Water*, with the separate claim being recorded as septic tank split due to *ground movement*.

Whilst I can't say whether that is correct or not, as this complaint and consideration is about the escape of water claim, I would just add that it is up to each different insurer approached by V's broker whether it wishes to exclude subsidence cover. This includes even if a subsidence claim hadn't been, made but that insurer deemed a claim due to *ground movement* due to *excess water washing away the subsoil and aggregate* sufficient enough risk to not want to cover subsidence.

So, with the above and my provisional decision in mind, I'm not persuaded it's been demonstrated that Ageas has incorrectly recorded the escape of water claim as subsidence, so I won't be directing them to do anything else. If V is able to provide any new evidence that the escape of water claim has been recorded incorrectly, then it should submit this to Ageas to consider in the first instance.

My final decision

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

- Carry out (and pay for) investigations to establish whether the ground has thawed, the impact this has had on the structure including ground underneath, if there are voids present, and the potential for future issues

- To facilitate this, Ageas will need to provide V with the details of three suitably qualified independent experts, and V will need to choose one to undertake this

- Once investigations are concluded, a schedule of works for a lasting and effective repair should be compiled for both parties to further review

Under the rules of the Financial Ombudsman Service, I'm required to ask V to accept or reject my decision before 20 December 2024.

Callum Milne
Ombudsman