

The complaint

Mr and Mrs J are unhappy Society of Lloyd's (SOL) declined a claim they made under their home insurance policy for subsidence damage to an outbuilding.

Where I've referred to SOL, this includes the underwriting syndicate which actually provides the cover under Mr and Mrs J's policy.

What happened

There have been several businesses involved in this claim and complaint acting as agents or representatives of either Mr and Mrs J or SOL. But for ease of reference, I'll only refer to Mr and Mrs J and SOL by name in this decision, even when referring to evidence or arguments put forward by their agents or representatives.

Mr and Mrs J raised a claim for cracking damage to an outbuilding in 2020. Site investigations confirmed the cause of subsidence was the influence of nearby mature trees on adjacent land causing clay shrinkage and downward movement of the land beneath the foundations. SOL subsequently declined the claim on the basis that the foundations of the outbuilding were faulty or defectively designed, owing to not having been built deep enough to take into account the likely influence of nearby trees. It relied on a specific exclusion under the policy terms for faulty or defective foundations.

Unhappy with SOL's decision, Mr and Mrs J brought their complaint to our service where it was considered by one of our investigators. He considered the available expert evidence from both sides, and said he found the evidence provided by SOL to be the most persuasive. He said he thought SOL's conclusions that the dominant cause of damage was defective foundations was reasonable, and so it was fair for SOL to have declined the claim.

Mr and Mrs J didn't accept our investigator's conclusions. So, as no agreement has been reached, their complaint has been passed to me to decide.

What I've decided – and why

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

Having done so, and while I appreciate it will come as a disappointment to Mr and Mrs J, I agree with the outcome reached by our investigator. I'll explain why.

The various claim investigations completed established the following:

- The presence of nearby vegetation on adjacent land, including a mature oak tree at a height of 14m around 9m from the corner of the outbuilding.
- The foundations of the outbuilding in the locations of the excavated boreholes were between 650mm to 750mm.

- The ground the foundations were built upon was a highly shrinkable, silty clay.
- Tree roots within the various boreholes to a depth of up to 1.5m.
- Desiccated soil to a depth of at least 2.6m in at least one borehole.

SOL has pointed to guidance published by one of the UK's leading new home warranty providers which it says would have required engineer designed foundations of at least 2.5m in conditions like Mr and Mrs J's, with such close proximity to a mature oak tree.

SOL accepts that this warranty provider's guidance would not have applied to construction of Mr and Mrs J's outbuilding. However, it says this guidance is used across the industry as a good starting point for the consideration of foundation depths in proximity to nearby trees. SOL also says it has primarily referenced this guidance to show that the foundation depths present at Mr and Mrs J's property were woefully inadequate when compared to such guidance.

SOL has further accepted that building regulations approval would not have been required for the outbuilding either. But it says the outbuilding should still have been built in line with good industry practice. And it says this would ultimately mean that it met the requirements of the building regulations.

Based on all the above, it says the dominant cause of the damage is the inadequate depth of the foundations. So, it maintains its decision to decline the claim is in line with the policy terms, as damage resulting from faulty design is specifically excluded:

"What is covered:

9.Subsidence or Heave of the site upon which the Buildings stand or Landslip

What is not covered:

We will not pay:

d) for loss or damage arising from faulty design, specification, workmanship or materials."

Mr and Mrs J say that the investigations undertaken by SOL were inadequate as they didn't include an arboriculturist or drainage report. They've said neither the warranty provider's guidance nor building regulations applied to the outbuilding and so shouldn't be relied on. And they've said that as desiccated soil was present at 2.6m, even if the foundations were built to 2.5m, subsidence would still have occurred. Based on this, they say it's unfair for SOL to consider the foundations were defective.

I've carefully considered everything both sides have said and provided. It doesn't appear to be in dispute that neither the warranty provider standards nor building regulations strictly applied to the construction of Mr and Mrs J's outbuilding in 2008. However, I agree that doesn't mean foundations of any depth would be considered adequate. Good industry practice should still have been followed to ensure that the builder erected a structure that was likely to stand the test of time and that took into account things like ground conditions and the presence of nearby vegetation.

In circumstances like this, I would consider that the relevant building regulations at the time of construction, as well as any associated supporting guidance for those regulations, can reasonably be considered as a good guide to how deep the foundations for a structure ought to have been. And the building regulations in place at the time the outbuilding was constructed required foundations in clay soils to be, at a minimum, 900mm deep.

Mr and Mrs J's own engineer seems to agree that building regulations can reasonably be considered as a minimum standard, even though they don't strictly apply:

"Having said that, in my report I did recognise that Approved Document A (2004) of the Building Regulations does make reference to the relevant code of practice BS8004:1986 and where section 3.2.8.2 of the same does point to special foundations at depths greater than 900mm being provided. Whilst I recognise that there is an argument that Building Regulations does not apply, it is arguably persuasive that British Standards represent a "minimum standard" (but not best practice), irrespective of regulatory requirements."

SOL's engineer has also referred to the above building regulation approved document and associated guidance and, in particular, what it says about constructions near trees:

"Care should be exercised to ensure that there is adequate space between new buildings and existing trees or the sites of trees that have been removed. Alternatively, special foundations founded at depths greater than 900mm should be provided."

Given that the outbuilding was founded on clay, within close proximity to a mature oak tree and other closely grouped vegetation, I'm not persuaded that the builder observed good industry practice in place at the time when constructing the foundations of the outbuilding at c.750mm.

I say this because, in my view, the reasonable minimum depth of the foundations, as a starting point, ought to have been 900mm. Then, due consideration should have been given to the likely impact of the nearby vegetation. Therefore, in order for me to be persuaded that the builder even broadly followed good industry practice, I'd expect the foundations to have exceeded 900mm in depth, in order to demonstrate that the ground conditions and the likely effects of nearby vegetation had been taken into account during construction.

As the foundations here are significantly shallower than the reasonable minimum depth, I don't think it would be fair for me to conclude, even on balance, that the builder followed good practice by considering the ground conditions and nearby vegetation when constructing the foundations of the outbuilding. And I note that Mr and Mrs J have nothing from the time of construction to show that the foundations were appropriately designed to resist the influence of the trees either. So, taking all of this into account, I think it was reasonable for SOL to conclude that the foundations of the outbuilding were not appropriately designed or constructed.

Mr and Mrs J have also argued that desiccated soil was found at 2.6m and that tree roots were likely to run deeper than the 1.5m they were identified at. So, they say subsidence would still have occurred even if the builder had followed building regulations and/or the warranty provider guidance and built the foundations to 2.5m.

I've thought very carefully about this argument, but it hasn't persuaded me that SOL's decision to decline the claim on the basis of the faulty design exclusion was unfair. I say this because none of the guidance or regulations I've referred to provide a specified depth for adequate foundations. Rather they set out a minimum depth and require that consideration be given to the particular conditions present at the site.

Based on the available evidence, I can't be certain whether foundations at 2.6m, or even deeper, would have been sufficient to mean that the outbuilding wouldn't have suffered from subsidence damage. But I am persuaded that by building the foundations at the shallow depths they did, that good practice at the time was not even broadly followed.

SOL has also pointed out that while the outbuilding was exempt from building regulations, it would have required planning permission due its height and proximity to the boundary of the property. But it says no planning permission was obtained. SOL argues that had planning permission been obtained, it's likely that building control would have expected a detailed site assessment, including consideration of the subsoil and nearby trees.

I've thought carefully about this argument, and I find it persuasive. On balance, I think it's likely if planning permission had been sought, such site investigations would likely have been recommended and carried out prior to the construction of the foundations. Had this have happened, the influence of the trees and the depth of roots and desiccation would likely have been identified, and therefore the foundations placed at such a depth as to resist the influence of the trees, i.e., greater than the 2.6m depth where desiccation was identified. And had all of this happened, I find it unlikely that the subsidence damage which is the subject of this claim would have happened.

None of the above took place, and instead the building was founded on foundations which were significantly shallower than the minimum suggested depth for foundations on clay – seemingly without taking into account the presence and likely impact of the nearby vegetation at all.

Given the above, and taking into account all the expert evidence provided, I'm persuaded that the dominant cause of damage in this case is the faulty design and construction of the foundations. So, it therefore follows that I think SOL's decision to decline the claim on the basis of that exclusion was both in line with the terms and conditions of Mr and Mrs J's policy, and that it was fair and reasonable in the particular circumstances of this claim and complaint.

My final decision

For the reasons I've explained above, I don't uphold Mr and Mrs J's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J and Mrs J to accept or reject my decision before 4 December 2023.

Adam Golding
Ombudsman