Decision Ref:	2018-0153
Sector:	Insurance
Product / Service:	Household Buildings
Conduct(s) complained of:	Rejection of claim - late notification
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The complaint concerns the refusal or failure of the Provider to indemnify the Complainant under a household insurance policy which she holds with the Provider. The claim concerns damage to an adjoining property, allegedly as the result of defective work on an extension constructed on behalf of the Complainant in 2004. The Provider has refused to indemnify the Complainant for the subjugated claim due to late notification of the claim. The Complainant argues that although she was aware that there was a complaint in relation to damp from October 2013, she was unaware of a claim until June 2015 when a solicitor's 21-day warning letter was received by her, at which point she immediately notified the Provider. The Complainant seeks indemnification under the policy.

The Complainant's Case

The Complainant notes that her insurer, the Provider, is refusing to indemnify her in respect of a subjugated claim by the adjoining owner of her property and his insurers. The Complainant states that the Provider suggests that she had knowledge of a material damage claim as far back of October 2013. She suggests that she only had knowledge of a complaint by her neighbour in respect of a leak between the sidewalls of the ground floor returns to the two properties at that time and that the damage claim was largely subsumed or hidden within a rear boundary/hedge line dispute. The Complainant suggests that her neighbour always intended to rebuild his old return and had planning permission for same granted in 2005 and renewed in 2010. In those circumstances, she states that she dealt directly with her neighbour with the assistance of her architect and engineer who carried out an inspection on the internal sidewall of the old ground return of the neighbouring property.

She notes that her engineer confirmed minor damage only and despite the fact that the old return was to be rebuilt, she offered to pay for flashing to the roof between the two rear returns but the offer was refused.

She states that she only became aware of the reason for this refusal when she received a letter for solicitors acting on behalf of her neighbour's insurers dated 19 June 2015 advising that her neighbour had been paid a sum of €269,448.59 plus further insured losses and fees on foot of an insurance claim lodged by her neighbour. She states that this was the first notification to her of a claim which she then forwarded to the Provider.

The Complainant argues that while she had notice of a complaint from her neighbour in October 2013, it was presented as a minor matter and her engineer's report from August 2015 confirms this. The damp noted on the internal sidewall of the ground floor annex of the adjoining property was localised to the side annexe wall and it was further noted that the annex was very old and had no damp-proof course. Based on that advice, the Complainant was prepared to deal with the matter herself and proceeded to do so and believes that any reasonable person might have done likewise. She states that the first notice of an insurance claim was the letter of 19 June 2015 which she notified her insurer of as soon as possible. She argues that there was always the intention of her neighbour to rebuild the annex regardless of the presence of the localised damp. She further notes that if the damp had been other than localised, the property could not have been lived in or occupied and was so occupied until early July 2015. She states that the insurance claim between her neighbour and his insurers requires detailed analysis and that the Provider is best placed to fund such enquiries and she does not have the resources to do so. As she notified the Provider of the subjugated insurance claim as soon as possible after 19 June 2015, she argues that she met the policy condition of notification and should be indemnified. She reiterates that she never spoke to her neighbour or received any correspondence from him prior to 15 October 2013. The Complainant states that her neighbour has built a two-storey extension on the site of the old ground floor return. She concludes that the situation has caused considerable stress and has had a detrimental effect on her family life.

In a letter of appeal to the Provider dated 14 December 2015, the Complainant makes many similar points to that set out above and argues that there is a fundamental difference between notice of the minor complaint of which she was aware in October 2013 and notice of the major insurance claim of which she only became aware in June 2015 and which she referred on as soon as possible. By letter dated 27 February 2017, the Complainant notes that there is no transcript of an important call made by her to LW of the Provider on 13 July 2015 during which she advised the Provider that the owners of the adjoining property were about to start building work. The Complainant notes that she was advised that a survey by the Provider was not necessary as they would rely on reports, however the Provider now states it is prejudiced by the absence of such inspection, even though she gave the Provider sufficient notice to arrange such an inspection. She further clarifies that the comments made by her architect as confirmed by her solicitor were in the context of localised damage to the ground floor of the return of the adjoining property. She states that the building work that was carried out on her own property in 2004 was done in a professional manner with full site survey and risk assessment carried out and that properly prepared plans were lodged with Dublin City Council and planning permission granted on foot of the plans. She states

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that she offered to pay for flashing between the rooves of her extension and the roof of the adjoining property. She clarifies that there was no prior correspondence from their next-door neighbour prior to October 2013 and that at a meeting with their neighbour on 30 August 2014, he told her that the damp issue had been sorted.

The Provider's Case

The Provider informed the Complainant that it was not in a position to indemnify her in relation to the claim on the basis of late notification by letter dated 24 November 2015. The Provider noted the extension built in 2004 and the ongoing difficulties with the Complainant's neighbour in relation to the boundary between the properties. The Provider pointed to a letter from the Complainant's neighbour dated 15 October 2013 in which he stated that he wished to 'again' inform her of the breaches of planning permission in the construction work and the serious damage in the form of water leaking into his house, his kitchen and adjoining walls at the rear from works carried out by the Complainant affecting his roof and sidewall. The Provider was therefore satisfied that the Complainant was aware that a problem existed in relation to damage and to damp to the third party property from 2013. The Provider points to an alleged breach of the policy terms and conditions. The policy booklet sets out "*conditions which apply to the whole policy*" and obliges an insured to notify the Provider when she becomes aware of a claim as soon as possible. The condition further requires that any legal documents or letters of claim or other correspondence served in connection with a claim must be sent to the Provider as soon as possible and that the correspondence should not be answered without the Provider's written consent. The Provider notes that following the allegation of damp, the Complainant engaged her own architect and engineer who inspected the property and that her engineer conceded and it was further conceded by her solicitor that a failure at the time of construction to flash a 10 cm gap between the extension and the return on the claimant's property may have contributed to the ingress of rainwater causing damp and damage. The Provider noted that it was not therefore in a position to indemnify the claim due to late notification.

In response to an appeal raised by the Complainant, the Provider reiterated it was not in a position to indemnify the claim by letter dated 14 January 2016. The Provider noted that notification occurred nearly 19 months after the first letter delivered in October 2013. It argues that the non-notification has been highly prejudicial apart from the delayed investigation as it has potentially led to an escalation in the cost of the overall claim. The Provider notes that the Complainant's own solicitor and engineer conceded that a failure at the time of construction to flash the gap between the extension and a return on the property owned by the neighbour contributed to the ingress of water causing damage.

By letter dated 11 January 2017 in response to questions raised by this office, the Provider states that its refusal to indemnify the insured Complainant for a liability claim being made by a third party for damage caused to the neighbour's property is due to late notification of the claim to the Provider and its opinion that its position has been prejudiced by the late notification of the claim. The Provider is of the opinion that it acted in a reasonable and just manner as it investigated the claim when it was advised of it and advised the Complainant of the outcome of the investigation of the decision in relation to her claim.

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Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence.

The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 8 August 2018, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following consideration of an additional submission from the Complainant received by this Office on 19 September, my final determination is set out below.

Crucial to a determination in relation to this complaint is the notification condition that the Provider seeks to rely on. The condition in question is not described as a condition precedent in the policy but I accept that it is a condition of the policy rather than a warranty as it is contained within a section entitled "*conditions which apply to the whole policy*". The notification condition provides as follows:

> "1. *Notification of a Claim*
>
> *You must notify Us when You become aware of a claim under Your Policy as soon as possible. . . . Any writs, summons, other legal documents, letters of claim or other correspondence served on You or any member of Your Household in connection with a claim must be sent to Us as soon as possible. You must not answer this correspondence without Our written consent. . . .*"

A large volume of correspondence has been provided in support of the complaint referable to the dispute between the Complainant and her neighbour between October 2013 and the

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receipt of the official notification of claim on 19 June 2015. It appears from this correspondence that the issue of damage to the adjoining property arising from damp allegedly due to the manner of construction of the Complainant's extension was first raised in October 2013. It is further clear from the correspondence that the complaint in relation to the damp was largely overtaken in the correspondence by a dispute in relation to the boundary between the two properties.

The issue of damp was, however, frequently raised. Solicitors were engaged to act on behalf of the Complainant and her neighbour. In the course of the boundary dispute, it appears that a conversation took place on 30 August 2014 in which the Complainant's neighbour indicated that he was willing to overlook the water damage to his ground floor return if the Complainant allowed him to put the fence where he wanted to and that he had remedied the situation in the interim.

On the basis of the correspondence between the Complainant and the neighbour, it appears to me that a claim was threatened as early as January 2014. It appears that there was agreement between the Complainant and the neighbour that some remedial works would be carried out to weather the gap between the roof and the boundary wall as early as November 2013, though no immediate progress appears to have been made in relation to this proposal. By letter dated 22 January 2014, the Complainant's neighbour refers to the lack of progress in seeking to have the Complainant resolve the damage generated and recommending a meeting to discuss the issues arising.

The letter notes that the neighbour has briefed a legal team who is ready to act to pursue the matter through the courts and that his legal team are ready to commence proceedings at very short notice, though he would rather not take this route if possible. In a letter dated 2 April 2014, an architect on behalf of the Complainant wrote to the Complainant's neighbour noting her position in relation to the boundary dispute and acknowledging the following:

> "*3. Flashing between adjoining returns:*
>
> *We acknowledge that flashing is required between the two properties and that the omission of this has contributed to water ingress to the party wall of your return*."

By letter dated 17 April 2014, solicitors acting on behalf of the Complainant's neighbour noted that the extension constructed by the Complainant to the rear of the premises was built too close to the neighbour's property and has caused significant damage to his property. The letter acknowledges some engagement but argues that there has been no meaningful engagement to seek to resolve the issues and that in the circumstances, the client feels he has no alternative but to ask solicitors to write and, "*if necessary, to commence proceedings in respect of these matters*." The letter goes on to allege that the extension was constructed too close to the adjoining premises with the consequence that rainwater has run from the roof of the rear return into the gap between the two buildings, saturating the wall of the neighbour's return. The letter suggests that the Complainant's neighbour's engineering expert has estimated sizeable water permeation in the soil at the rear wall and evidence of extensive cracking to the structure of the return. While it is clear

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that no proceedings were in fact issued at that juncture and that there were further attempts to resolve the issues made by the parties, a claim is clearly contemplated in this letter dealing, at least in part, with the alleged damage to the property. While it is clear from the complaint that the Complainant strongly rejects the alleged extent of the damage caused to her neighbour's property, correspondence emanating from her neighbour in 2013/2014 makes it clear that, in his view, significant damage has been caused.

By letter dated 12 May 2014, solicitors on behalf of the Complainant's neighbour acknowledge the letter from the Complainant's architect noting that the architect acknowledged that water ingress had been caused to the party wall of the neighbour's return as a result of the manner in which the works were carried out. It reiterated its client's position that damage had been caused to the foundations of the return by the ingress of excessive quantities of water caused by the construction of the extension too close to the return and the unauthorised removal of an eave gutters. The letter notes that the advice received by its client was that the damage was so extensive that significant remedial works would be required and that the introduction of flashings at this stage would be much too little too late. The letter argues that significant damage has been caused to the return by an unauthorised development and that an application under the Planning and Development Act would be appropriate if the issue is not resolved. The solicitors further refer to the "*open acknowledgement of liability in your letter*". By letter dated 18 June 2014, solicitors on behalf of the Complainant's neighbour noted that unless there was a sensible response, there was no option but to commence proceedings. In response, by letter dated 29 May 2014, the Complainant's solicitor confirmed that there was no eave gutter at the time of construction and that the extension was built in compliance with planning permission. It also offered to pass on proposed flashing specifications as soon as they were received from the architect. Flashing proposals were sent by letter dated 22 July 2014.

By letter dated 13 July 2015, the Complainant wrote to the Provider enclosing a letter from solicitors acting for the insurers of her neighbour. The letter is dated 19 June 2015 and states that the solicitors are satisfied that liability for damage to the adjoining property rests with the Complainant from the construction of an extension to the rear of her premises which, as a result of the ingress of water, ultimately manifested in damage in their clients property in October 2013. The letter states that as a result of the Complainant's negligence, their clients suffered a loss of €269,448.59 to date plus loss adjusters fees, engineers fees and uninsured loss following the ingress of water at the property. It states that in the absence of an admission of liability within 21 days, the solicitors have instructions to issue proceedings on behalf of their client without further notice. By letter dated 19 July 2015, the Provider responded to the Complainant, noting that the solicitors advised that the damage occurred in October 2013 and pointing out that it was unable to confirm its interest as household insurer in view of the possible delay notification of the matter. It was therefore reserving its rights under the policy in view of the potential breach of policy conditions. Further correspondence was then exchanged between the parties and the claim was rejected on the basis of late notification as set out above.

The Complainant relies on an engineer's report dated 11 August 2015 which gives the engineer's opinion with regard to the extension to the Complainant's property. The engineer notes that there was damp ingress onto the wall at both low and high level at the sidewall

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of the rear annex of the adjoining property. The report notes that, given the age of the property, it is most likely that there is no damp proof course at the base of the wall and, as such, the wall would be more susceptible to rising damp issues. The engineer further notes that the construction of the extension formed a narrow cavity between the properties and no closing detail between the roof of the Complainant's property and the sidewall of the adjoining property was applied. The engineer states that rainwater falling into this gap increases the potential for damp issues due to a possible trapping of the water. It suggests that the installation of a closing detail between the properties would reduce the potential for damp ingress.

In conclusion, the engineer notes its opinion that the damp identified on the internal face of this sidewall of the adjoining property may have been caused in part by two possible sources: first, rising damp due to the nature of construction of the building and second, ingress of damp from trapped rainwater between the rear extension walls. It was further noted that the high level of dampness was only evident in the side annex wall.

The Provider engaged a loss adjuster to investigate the claim and the loss adjuster's report dated 10 September 2015 has been provided. The report notes that the property in question has a single-storey extension to the rear built in 2004 and that the Complainant was advised in October 2013 that there was a leak in the return of the neighbour's property which was allegedly caused by the erection of the single-storey extension. The report notes that the Complainant accepts that when she was originally notified of damp to the next-door property, the Complainant undertook to have an architect and engineering firm attend on the neighbour's premises to inspect it and that this was done in 2013. It was determined by the architect and the engineers that there was a small area of damp in the wall adjacent to that of the insured's property to the rear of the return in the neighbour's premises. An engineer's report suggests that there was no insulation to the rear return which would have contributed to rising damp but further suggests that when the extension was erected, it should have been flashed to the return of the neighbour's side of the property to cover the 10 cm gap left between the two buildings.

The report suggests that it appears to be conceded by the Complainant that the creation of the 10 cm gap allowed rainwater to fall between the two buildings, leading to an ingress of water/damp on the neighbour's property. Following conversations between the parties, the Complainant costed the installation of flashings to alleviate the damp/water problem in July 2014 and, while she did not offer to pay for the installation of the flashing, she suggested that this was an appropriate course of action. The report also notes that the Complainant has suggested that the neighbour indicated in August 2014 that he was willing to overlook the issue of water damage if they could agree the boundary issue and that the damp issue was not given any further consideration until the formal receipt of the letter of claim. The Complainant is of the view that if there was any damp, it was minor and could not have caused any significant value and damage. Although the Complainant accepts that there was an allegation of damp in 2013 and that a small area of damp has been found, the Complainant cannot countenance how any level of damages can be sustained and believes that the neighbour is simply looking for someone to pay for an extension to the rear of his premises.

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The loss adjuster notes that the Complainant advises that she was simply not aware that the matter should be reported to the Provider and did not consider the issue of damp or water ingress to be a pertinent one or the subject matter of any claim. The Complainant was of the view that the issue was in reality in relation to a boundary dispute and that the issue of damp or water damage was a side issue which was dropped on many occasions since the first notification. The loss adjuster's report notes that the Complainant's solicitor acknowledged by letter dated 2 April 2014 that flashing should have been installed between the two properties when the extension was constructed and conceded that the omission of that flashing partly caused the damp problem. The loss adjuster was therefore satisfied that the insured was aware that the problem existed in relation to water and damp to the third party property from 2013.

In relation to legal liability, the loss adjuster notes that the Complainant's own engineer and solicitor conceded that a failure at the time of the extension was built to flash a 10 cm gap between the extension and the return may have contributed to the ingress of rainwater causing damp and damage to the premises. While there is a further allegation that lack of damp proofing installation caused rising damp and the property, the loss adjuster notes that there appears to have been an admission that a failure to flash the two buildings together was at least a participant cause of the damage. On the basis of these admissions, the loss adjusters are satisfied that it is likely that the insured will be held open to a finding of negligence in relation to the presence of damp and/or ingress of water to the neighbours property. The loss adjuster notes that the Complainant does not accept that any considerable damage was caused but feels that the Complainant has placed herself in an exposed position in relation to the concessions made and the acceptance that a failure to flash the two buildings together was a partial if not proximate cause of the damage to the property.

The key question arising in the present complaint is whether the Complainant had sufficient notification on or after October 2013 of the making of a claim by her neighbour in relation to alleged water damage to his property as to engage the notification condition of her insurance policy, as set out above. It is noteworthy that unlike many notification conditions of this type, the first line of the condition in question does not require the insured to inform the insurer of any circumstances which may or would likely lead to a claim and rather only requires notification when the insured becomes aware of a claim. The insured is, however, obliged to send to the insurer any letters of claim or other correspondence served in connection with a claim as soon as possible. The insured is also obliged not to answer this correspondence without the written consent of the Provider.

The Complainant, in her post Preliminary Decision submission states "*I would again like to reiterate that I had no knowledge of an insurance claim by the owner of [neighbour's address] until I received the letter from [named solicitors] dated 19 June 2015.*

However, in my view, as early as January 2014 and at the latest in April 2014, the Complainant ought to have been aware that a claim was contemplated by her neighbour in relation to the alleged damage that arose. It is apparent from the correspondence that numerous attempts were made on both sides to avoid the necessity for legal proceedings but the threat of legal proceedings against the Complainant was at the centre of much of

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this correspondence. The likelihood of a claim being made should therefore have been apparent to her even if the Complainant did (and does) not accept the extent of the alleged damage. Furthermore, the correspondence passing from the Complainant's neighbour and particularly from his solicitors from April 2014 onwards must be considered as "*letters of claim or other correspondence . . . in connection with the claim*" which the Complainant was obliged to send onto the Provider as soon as it was received. In addition, the Complainant was obliged not to respond to this correspondence pending the written consent of the Provider. Although I appreciate that the Complainant was attempting to avoid litigation and sought to remedy the situation herself, I must accept that the notification condition of the policy was breached by the Complainant in the present case. The Complainant was aware of the possibility of a claim from at least early 2014 onwards, she failed to pass on relevant letters of claim and other correspondence in relation to a claim to the Provider, and crucially responded to that correspondence without the input or consent of the Provider. This involves clear and serious breaches of the notification condition concerned.

While, in some instances, no great prejudice might arise as a result of a breach of a notification provision, I accept the argument of the Provider that it has suffered prejudice as a result of the breach in the present case.

The main prejudice resulting is the acknowledgement by the Complainant's architect and solicitors that the manner in which the extension was constructed may have contributed to the damp that occurred to her neighbour's property. I further note the various offers made by and on behalf of the Complainant to construct flashing between the two properties to minimise further damage. An admission along these lines may have a material impact on the conduct and outcome of the contemplated litigation in relation to the damage, despite the firmly held view of the Complainant that the damage was minimal, as evidenced in the report of her engineer from August 2015. The reason why an insurer (such as the Provider in the present case) inserts a condition obliging an insured not to answer legal correspondence without its consent is so that it maintains control over any admissions made in the course of litigation. Admissions have now been made without the input of the Provider and I accept that its position is prejudiced as a result.

I acknowledge the very difficult position that the Complainant now finds herself in, facing a very large subjugated claim from her neighbour which she disputes the extent of, without the assistance of the insurer that she hoped would conduct the defence of her case. I further acknowledge that the Complainant's failure to notify the insurer in a timely manner of the claim and the documentation concerning it was not done deliberately or with any advertence. I accept that she was attempting to rectify the problem on an informal basis and to keep the cost to a minimum. Regardless of her intentions, however, the Complainant has breached the notification condition of her policy in the present case and the Provider has suffered prejudice as a result. In these circumstances, I accept that the Provider was entitled to refuse to indemnify the claim that was made against it owing to the late notification.

In all of the circumstances, therefore, I do not uphold the complaint.

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Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

12 October 2018

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,
(ii) a provider shall not be identified by name or address,
and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.