



<u>Decision Ref:</u>	2019-0196
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Household Buildings
<u>Conduct(s) complained of:</u>	Rejection of claim - subsidence or heave Failure to advise on key product/service features
<u>Outcome:</u>	Substantially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainants incepted an insurance policy with the Provider in May 2005 in respect of their home. The complaint concerns the Provider's handling of a claim under that Home Insurance Policy. The complaint is that the Provider has not acted correctly or reasonably in relation to the assessment of the claim.

The Complainants' Case

By way of background the Complainants say that they approached their Bank in February / March 2005 to apply for a mortgage for the property that is the subject of this dispute. The Complainants state that the Bank advised that in order for a mortgage to be approved they would be required to provide evidence of the property being underpinned and would also need to provide the Bank with an engineer's report on the property. The Complainants state that the reason for the evidence of underpinning was because the Bank had refused another person a mortgage for the property in late 2004. The Complainants says that this was someone whom they knew. The Complainants state that the Bank required the engineer's report prior to the mortgage being approved. The Complainants got an independent engineer to carry out a report on the property and also got evidence from the company who carried out the underpinning. Both of these documents were given to the Bank and within a few days the Complainants received confirmation that both documents were approved and that the mortgage was also approved. The Complainants state that they paid a deposit and with the mortgage approved they purchased the property. The Complainants state that they also purchased home insurance and life insurance through the Bank.

The Complainants state that there is a history of other houses in the estate being underpinned. The Complainants say that the property was externally underpinned in February 2005. The Complainants state that there were visible cracks to the rear of the building externally and also inside the building prior to them purchasing the property in 2005.

In December 2009 the Complainants noticed that the back door of the house was not opening properly and that the side gate at the gable end of the house was not closing due to what appeared to be movement from the path. The Complainants state that they checked this again in January 2010 and at this stage they could not open the back door as it had become too stiff.

The Complainants state that when they purchased the house there were external and internal cracks in the walls and ceiling. They state that all of these cracks were repaired and pointed or plastered over, where applicable. The Complainants says that in and around the same time of noticing problems with the back door and gate they also noticed that all of the cracks which had been repaired had reopened and some had become worse than the original ones.

The Complainants state that they asked a local builder to come and look at the house as they wanted to get the cracks repaired again and also to ask his opinion on the back door and side gate. The Complainants say that the builder advised that it looked like subsidence and that he needed to look into it further. The builder had concerns as to why the house was only underpinned externally and not Internally. The Complainants say that the reason the builder raised this issue was because this builder had underpinned a house in the same estate in the summer of 2004 and said he underpinned both externally and internally. The Builder stated that there appeared to be the same cracking pattern in the Complainants' property as the other underpinned property.

The Complainants state that with this information they got in touch with a Loss Assessor. The Complainants state that the Loss Assessor checked the home insurance and said that there was cover for subsidence with an excess of €1000.00 outlay within the policy. The Complainants submitted a claim. The Complainants submit that a few weeks later the Loss Assessor and the Complainants met with the Provider's Loss Adjuster. The Loss Adjuster took numerous pictures inside and outside of the property. The Complainants say that the Loss Adjuster categorically stated that she needed to do a drains test to show that there was an Escape of Water which was causing the subsidence and internal/external cracking. The Complainants' position is that the Loss Adjuster categorically stated that if there was an Escape of Water the insurance company would stand over the claim. The Complainants got an independent drains test carried out which confirmed a failure of the drains. The Complainants state that when the Loss Assessor and the Complainants went back with the results the Provider's Loss Adjuster's attitude changed and she asked for trial holes to be dug and an engineer's report formulated. The Complainants state that they got these carried out and submitted

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them to the Loss Adjuster. The Complainant state that they were told she was no longer working on the claim as she had left her post. The Complainants state that the Provider refused to stand over any report given by them as it was saying that it was down to foundation movement and possible infill. The Complainants say they were told they needed to do underground investigation works which when they looked at getting done at a cost of over €4,000. This they state, may not have answered the questions required. The Complainants state that they could not afford to do this due to being unemployed at the time. The Complainants submit that at this stage they were becoming increasingly frustrated and felt that the Provider was putting stumbling blocks in front of them. The Complainants state that they stopped paying the Mortgage as well as the Life Insurance.

The Complainants continued to pay the home insurance until August 2010, at this stage they received a new policy and to their surprise the cover for subsidence was removed. The Complainants state that when they questioned this, as they found it quite strange, they were told that it was a decision the insurances company's underwriters took.

The Complainants submit that they have 3 young children and in April 2013 they applied for a council house as they could not stay another winter in the house. The damp at the gable end of the house meant that all the clothes in the bedrooms at that side of the house were ruined and needed to be destroyed due to mould. The down stairs toilet was black from the floor to half ways up the wall as a result of the crack on the external footpath. The Complainants say that they were spending approx. €400 a month on oil.

The Complainants state that the main reason they decided to leave was the fact that their 3 year old at the time was getting chest infections every few weeks and was at the doctor all the time (the Complainants state that they can provide medical evidence of this if and when required). The Complainants say that as a result of this the Second Complainant developed a Health anxiety condition due to the stress relating to their sick child and the conditions they were living in. The Complainants submit that the First Complainant was offered a position in London in July 2013 and felt that it was the right thing to do for his family at the time. The Complainants say that they spent approximately €1,500 on general repairs around the house in order to rent the property.

The Complainants set up an appointment with the letting agent to rent the house out as the rent would go towards the monthly mortgage repayments. The Complainants state that when the letting agent saw the condition of the house he advised that he would not be able rent the property. The Complainants say that the letting agent was shocked and horrified that they could be living in a house in such a poor condition with 3 young children. The Complainants say that this information was relayed back to the insurance company but fell on deaf ears.

The Complainants submit that they had contact with the Provider and the Bank and were passed from pillar to post with no resolution in sight. The Complainants say they are appalled by the attitude of some of the people they have spoken to.

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The Complainants state that they only ever wanted the house to be made liveable so they did not have to emigrate. The Complainants say that the house was repossessed and the Bank tried to sell it for €70,000.00 claiming that it needed upgrading and, whilst also looking for the full mortgage payment of €229,000.00. The house was eventually sold for approximately €62,000.00.

The Provider's Case

The Provider states that this complaint arises from the Provider's declinature of the insured's claim for damage to the Complainants' home.

The Provider sets out the Timeline of events as follows

15/5/05 - Policy incepted by insured through a Bank.

1/3/10 - Claim reported by insured to the Provider.

9/3/10 - First inspection by Loss Adjuster. Engineers report sought from insured regarding causation.

18/10/10 – the Complainants' solicitors confirmed engineer appointed. The Provider appointed an engineer to liaise with the Complainants' engineer at this time.

13/8/12 – The Complainants submitted photographs of damage and advised they were not in a position to pay for an engineer.

16/8/12 – The Provider's Loss Adjuster wrote to the Complainants advising that it is their responsibility under the policy to substantiate the claim.

In October 2012 – The Provider agreed to fund the cost of further enquiry given the Complainants' circumstances.

5/11/12 – The Provider advised the Complainants that an engineer was to be appointed at the Provider's expense.

12/11/12 – Report from 'Independent Drain Testing'

20/11/12 – Report from .. engineers following 2 inspections at the Complainants' property.

5/12/12 – The Provider's Loss Adjuster declined the claim on behalf of the Provider.

The Provider states that the complaint arises from declinature of the Complainants' household claim. This claim was in respect of different aspects of damage to the insured property. The Provider states that the damage can be broken down as follows;

“Dampness and moisture which related to condensation and therefore did not occur as a result of an insured peril.

Issue on the ground floor bathroom which was deemed to be due to rising damp. This is not covered under the policy on the basis that there is a specific policy exclusion which excludes damage caused by “Gradually Operating Causes”.

Cracking to external walls and movement which had affected the operation of the back door. This damage pre-existed our cover on the policy and was evident prior to the insured's purchase of the property in 2005. This is noted in a pre purchase survey of the property prior to the inception of our policy. It was recommended to the insured that this cracking be monitored in order to ascertain if it had stabilised

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or was continuing to deteriorate. Unfortunately the insured does not appear to have carried out this recommended monitoring”.

The Household Insurance policy was incepted on 15th May 2005 and remained in force until 15th April 2013.

The Provider states that it received a claim from the insured and appointed Loss Adjusters to investigate the matter on its behalf and following an inspection from them information was requested from the Complainants to support his claim. The Provider states that this is in keeping with the terms of the policy. The Provider states that over two years passed before the Complainants wrote stating he was not in a position to pay for an engineer. The Provider submits that shortly after this the Provider agreed to fund further investigation to enable the Complainants to have every opportunity to have his claim considered. The Provider says that following reports from an engineer and further inspections by its Loss Adjuster the Provider wrote to the Complainants explaining the reasons why his claim was not covered under the policy. This letter also recommended that the Complainants should have monitoring undertaken. The Provider states that it understands that there is substantial damage to the Complainants’ home and that this has had a significant impact on them both and on their family, but states that the damage is all outside of the scope of cover under the policy and that it has no offer to make in this case.

Additional submissions from the parties

Complainants’ submission of 16th May 2018

The Complainants state that the declaration on the proposal form states that:

“The home is in an area which is free from flooding, subsidence, heave, landslip, coastal or river erosion”.

The Complainants state that there has been no exceptions to this declaration noted on the proposal form in the section provided.

The Complainants state that the Provider is looking for details outlining full details of previous subsidence issues and question why they did not disclose this information at the time. The Complainants state that the Provider received all the reports from their appointed specialist and an Independent Engineers Report from them prior to being approved for a mortgage.

The Complainants refer to the Valuation Report for mortgage on the property that was filled out by the person valuing the property and say that they put down “No” in answer to section 9 “Condition of Property” Part (f) **“Is the property in the surrounding area affected by subsidence, heave, settlement or flooding?”** It is the Complainants’ position that the Valuer would have had a better knowledge of the area and the property as that was his field yet he said “No” as they themselves had done when completing the application form. The Complainants state that they were not aware of there being a subsidence issue until

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2010 when a builder in the area told them that other houses in the estate had subsidence issues. The Complainants state that they both signed the declaration in good faith as a result of the construction Report and the report carried out on their behalf. The Complainants state that they did not sign the declaration with a view to claiming off the Provider in the future.

The Complainants state that the Provider is the professional body here. The Complainants submit that when the Provider received this information prior to the mortgage being approved it did not flag it up as an issue. The Complainants say that instead the Provider allowed for Subsidence to be included in the original policy which had a cover period from 15/05/09 to 14/05/10 and an excess of 1000 euros applied. The Complainants state that clearly this was a mistake on the Provider's behalf, one in which it rectified when it removed the Subsidence cover in the new policy dated 19/05/2010.

The Complainants submit that with the above in mind they are not Engineers nor Insurance experts, and that they were purchasing their first home and did exactly what they were asked to do by the Bank. The Complainants state that they purchased the property in good faith and paid home insurance as per the conditions within the policy. The Complainants state that they never questioned the Bank's requirements or the Provider's home insurance policy.

The Complainants state that there were two drain tests carried out and both failed and that this points directly to an issue of movement/subsidence. The Complainants submit that these drains are a lifetime job once installed and only break/crack when there is movement. The Complainants state that the same can be said about the cracks in the house they were all repaired and they reopened.

The Complainants draw particular attention to the photographs of the back door and state that as this is a clear sign of movement, and questions how else would the door not close properly. The Complainants state that there is approximately a 2 inch gap there. The Complainants note that at no stage has the Provider explained as to why this is so. The Complainants state that the same applies to the photograph of the footpath on the gable end of the house and that this points directly to movement as well.

The Complainants state that they have not seen the Engineer's Report carried out on behalf of the Receiver of the property in the documentation that they received. The Complainants say that they have requested this report from the Receiver on several occasions but have not yet received a copy. The Complainants say that the property was sold for less than the asking price as a result of the contents within this report.

The Complainants state that when the claim was submitted all they wanted was that the house be repaired and be left in a liveable state not what has resulted to them and their family.

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The Complainants' further submission of 23rd May 2018

The Complainants state as regards the extensive report dated 20th November 2012, by the Provider's specialist they would like to question Section 4.2 in the Property Description. The Complainants say that the engineer has explained this area of the property in 3 lines yet it was here where the drains test was carried out, the path cracked, the path moved away from the gable end of the house and the side gate was not closing properly. The Complainants find it strange that this was all missed. The Complainants state that the engineer has said that there was no signs of cracking or movement. The Complainants refer to Photographs of the gate at the gable end of the property which they state is clearly not closing properly. The Complainants state that the gap from the bottom of the gate to the top of the gate is significantly bigger which shows there was in fact movement. As regards the Photograph of the path at the gable end of the house, the Complainants state that this again shows that there is movement. The Complainants submit that although the report is quite extensive, they question how the Provider's specialist did not manage to see this. The Complainants say that the paths were also new and they had all cracked as well, and that the Provider's specialist did not seem to see that either.

The Complainants state that at no point in his report has the engineer mentioned the rear door being unable to close properly or all the doors internally not closing properly. The Complainants refer to Photograph 1 and 2 of the back door from which they say it can be seen that they are not closing properly. Similarly Photograph 3 is of one of the doors internally. The Complainants submit that when they purchased the house the back door was closing properly as were the rest of the doors in the property, and says that these doors would surely have only been effected this way by movement.

The Complainants state that as regards the Preliminary Inspection Form, on the General Information Notes under previous claims the Loss Adjuster has put down that there was "**1 sub claim that the prev owner had**". The Complainants question how were the Loss Adjusters aware of this as this is the first time they have been aware of this. The Complainants say they are not in any way denying the fact that the house was underpinned, but was not aware of a subsidence claim from the previous owner. The Complainants say that following on from this it was in fact the Bank and the Provider that informed them that the property had been refused a mortgage and that an Independent Engineer's report be carried out and that the underpinning report be provided also. The Complainants submit that this again shows that the Bank and the Provider knew there was a subsidence issue with the property yet the Provider still covered subsidence in the Home Insurance Policies up until the claim was submitted. Then it was removed.

As regards the Provider's response – particularly Email correspondent, he comments as follows:

The Complainants reiterate that he is not denying the fact that the house was underpinned, as they stated it was in fact the Bank and Provider who informed them of this. So the Loss Adjuster not doubting this fact is correct.

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The Complainants state that the proposal form was signed in receipt of the information they had received from the Auctioneer. The Complainants state that the Auctioneer answered No to the question about subsidence and says that the Auctioneer would have known much more about the property and area than they did.

The Complainants state that at no time did they ever intend to claim from the Provider. The Complainants submit that they provided the Bank and the Provider with all the information that they required to approve the mortgage, and they did not set the conditions out in the policies. That they state was done by the Provider who would have had a copy of the Independent Engineers Report and the report from the Construction company who carried out the underpinning and replacing of the drains.

The Complainants recap the salient points, as follows:

- The original Home Insurance had subsidence covered in it and once the claim was submitted the Provider removed this.
- The Bank and the Provider were aware of the subsidence issues as they were the ones requesting engineer's reports and underpinning/drains replacing reports.
- Drains test were carried out both of which failed.
- All the internal cracks were repaired but they reopened.
- The back door was not closing properly.
- The side gate was not closing at all.
- The new footpaths all cracked.
- The internal doors were not closing properly.
- Other properties in the estate had subsidence issues.
- The property had a previous subsidence claim which was identified by the Loss Adjuster not the Complainants.
- The house was sold for less than the asking price on the strength of an Independent Report carried out by a Receiver to the property which the Complainants were told identified a subsidence issue.

The Provider's response of 18th June 2018

The Provider states that it has reviewed the Complainants' correspondence and would restate its position from page 2 of its letter of 3rd May 2018 – *“Cracking to external walls and movement which had affected the operation of the back door. This damage pre-existed our cover on the policy and was evident prior to the insured's purchase of the property in 2005. This is noted in a pre purchase survey of the property prior to the inception of our policy.”*

The Provider submits that it is not disputing that this damage existed but did recommend that it be monitored to see if it had stabilised or was continuing to deteriorate. The Provider states that unfortunately the insureds do not appear to have carried out this recommended monitoring.

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With regard to the note from the Loss Adjuster stating that: ***"1 sub claim that the prev owner had"***, the Provider states that unfortunately the representative who recorded this is no longer with the Loss Adjuster and so the Provider cannot query this with her. The Provider states however that it has discussed this with the Loss Adjusters who have confirmed that the information completed on this hand written form is information that would have been obtained on scene from either the insured or, the insureds' Loss Assessor. The Provider says that this is the only source of information she would have had for this information.

With regard to the report by the Receiver to the property, the Provider states that it cannot comment on this as the Provider did not have sight of it. The Provider states that this was, it understands, commissioned by the Bank and is a separate matter.

The Complainants' response of 22 June 2018

The Complainants respond to the Provider's point about the "cracking to external walls and movement which had affected the operation of the back door". In response the Complainants state that when they purchased the house in 2005 the back door was opening and closing as normal and the side gate was closing and locking as normal. The Complainants say that they note that the Provider has said that it requested to monitor the cracking. The Complainants say that this was requested in 2010, 5 years after the house was purchased. The Complainants state that all the internal cracks were repaired but opened again. The Complainants submit that the engineers report which was carried out pre-purchase does not mention any issues with the back door or the side gate as there was no issue with either of them at the time the report being carried out. The Complainants consider that this would have been noted in the report if that was the case. The Complainants say that in late 2009 they noticed the back door not closing properly, the internal doors not closing properly and they were unable to lock the side gate as the path had come away from the gable end of the house. The Complainants state that these paths were new paths put down in 2008 when the drains and underpinning was carried out, they had all cracked.

The Complainants state that the Provider's second point rather confuses them as they said before they were not aware of there being another Subsidence claim until they saw what the Loss Adjuster had written down when they were sent the documentation. The Complainants submit that their Loss Assessor did not know of this either, and that this information would have come directly from the representative from the Provider's Loss Adjuster as she would have been the only person in a position to obtain such information as she was employed by the Loss Adjuster at the time. The Complainants state that they were in attendance when the Loss Adjuster did her report and neither the Loss Assessor or the Complainants themselves said anything about a previous claim as they were not aware of any.

The Complainants submit that the Loss Adjuster's representative was taken off the case very quickly.

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The Complainants submit that what they find quite strange is that the Provider is only answering some of his queries. The Complainants say that there were two tests carried out on the drains, which both failed yet the Provider is saying this would only cause rising damp. The Complainants' position is that this is not true, as the drains are a lifetime job once laid. The Complainants state that the report says nothing about the paths on the side of the house cracking, nothing about the side gate not locking. The Complainants question where did the reserve of 40k go. The Complainants say that the most salient point of the lot is why was the Subsidence cover taken off the Home Insurance Policy after the claim was submitted. The Complainants state that they recall the Provider stating it was an underwriter's decision. The Complainants say that the question they would like to ask is if there had been no claim submitted would the policy have been amended as it was fine for nearly 5 years prior to that.

The Complainants submit that the Provider has tried to use every excuse it can, saying it was wear and tear, condensation and even trying to blame the Complainants for stating that the area was free from subsidence even though it was the Auctioneer who they bought the house from filled that form out.

The Complainants say they have lost their home, one of their children has developed asthma as a result of staying in the house and yet the Provider thinks it is just a game with all its excuses.

Provider's response of 29th June 2018

The Provider submits that unfortunately it cannot comment any further with regard to the reference to a previous subsidence claim at the property, as the Loss Adjuster's employee left a number of years ago and she is the only person who could give more insight to this. The Provider states that the existence of a previous claim by the previous owner would not have any material bearing on this claim and has not influenced its declination. The Provider submits it is likely that the Loss Adjuster's employee was confusing the pre purchase issue and underpinning from 2004 and has just noted this incorrectly on her preliminary report.

The Provider states that this policy was reviewed prior to the renewal being issued in 2010 and due to the fact that a potential subsidence claim had been received cover was restricted with regard to this peril at that time. The Provider's position is that this is a decision that its Underwriters would normally make in such circumstances and it is within the Provider's commercial discretion to do this. The Provider states that it did continue to offer cover to the insureds in respect of other perils and this exclusion of subsidence cover was clearly communicated to the insureds.

The Provider states that with regard to it only responding to some of the Complainants' queries it says it is only commenting on issues that it wishes to add further clarity on, rather than reiterating all points which were part of the initial submission.

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The Provider states that the insured has suffered very significant loss and it understands that this has caused them considerable difficulty. The Provider says that unfortunately the position however remains that the damage is as set out in its letter of 3rd May 2018 and it has been provided with no evidence to change its declinature in this case.

The Complainants' submission of 6th July 2018

The Complainants question how would a previous subsidence claim have no material bearing on their claim. The Complainants submit that it does, and says that surely if there was a previous subsidence issue and the same subsidence issue occurred again 4 years later this would be very relevant. The Complainants state that the Provider is saying that in one instance it cannot comment on the Loss Adjuster's employee's reference to a previous claim because she left the company but in another instance it is saying it is likely that she got confused with the pre-purchase issue and the underpinning from 2004. The Complainants do not believe this contention.

The Complainants state that the removal of the subsidence cover from the policy in 2010 is an admission from the Provider that there was a subsidence issue otherwise the Provider would not have removed it. The Complainants say that they agree the new policy was clearly communicated to them with the subsidence removed hence the reason they did not continue with that said policy. The Complainants state that the condition of having subsidence cover within the policy should have been removed when they purchased the property in 2005 not in 2010 following a subsidence claim being submitted, if that had been the case they would not be in this position now. The Complainants consider that it is a failure on the Provider's behalf and now it is trying everything to avoid honoring the conditions within the original policy, which covered subsidence.

The Complainants' position is that all the evidence of cracking, doors/gate not opening/closing properly, drains test failing, dampness and the previous subsidence issue not only in their property, but also in the estate points to only one thing – "Subsidence".

The Complainants state that the Provider has only responded to the issues it wants to.

The Complainants state that the Provider has not explained why the engineer somehow missed the whole cracking of the paths on the gable end of the house the side gate not closing properly or the back door not closing properly. The Complainants submit that as previously stated these items were fine as per the original Engineer's Report carried out pre-purchase.

The Complainants make the point that if these issues were there due to the cracking which the Provider is saying caused the back door and side gate not to be operating correctly that they would not have waited almost 5 years to highlight this. The Complainants again question; "Where is the reserve of 40K gone?". The Complainants say that this money would have been more than enough to repair the house and this really sickens them to think that could have been the case.

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Time line of events up to 2013

1 March 2010 – Claim reported to the Provider.

9 March 2010 - Preliminary Inspection by the Provider's Loss Adjuster

"General Information

..

Previous Claims "W1sub claim that prev owners had"

File Note

"Insd was living in a different hse in .. in 2004 & a person he knew was trying to buy property but eng found a sub problem.

Had looked @ buying hse in '05 & had a pre purchase surveyor provide his report.

Eng has – this report – Eng from owner"

19 April 2010 – File note

"regarding Subsidence Claim .. [Provider] awaiting Loss Adjustors report regarding the claim, the property was underpinned in 2004 however there are some cracks on the outside & inside wall "

2 August 2010 – The Providers Loss Adjuster

"Please note that there was a previous subsidence claim at this address in 2005 when it was under different ownership and as such our initial investigations are to verify if this is a separate incident".

25 August 2010 – The Complainants' solicitor to the Loss Adjuster.

"Please note that our clients have retained the services of ... Engineers to carry out an inspection of the property on their behalf".

12 August 2012 – The Provider's appointed Engineer to Loss Adjusters

"It is of note that cracks in the external walls, internal walls and internal ceilings are referred to in the Pre-purchase Survey Report of

At this stage, I would comment that it is not clear that the property is suffering from any ongoing subsidence. I would recommend that perhaps we write to the policyholder's retained representatives and seek a report from them outlining their comments in relation to cause and details of what they are basing their findings on".

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13 August 2012 – The Complainants to the Provider

“Due to my current circumstances (unemployed) I am unable to carry out any further investigation or acquire an engineer’s report for the above address.

The situation and condition of the said address has now deteriorated so much that it has become a Health and Safety issue due to dampness and failure to open the back door. I had a painter come in to look at some paint and he advised me not to paint any rooms because of the dampness”

16 August 2012 Provider to the Complainants

“As discussed, with any insurance claim, the onus of proof is on the Policyholder to demonstrate to Insurer’s satisfaction that the damage caused to the property has arisen as a result of the operation of an insured peril e.g. escape of water, fire, flood etc. subject to the terms, conditions and exclusions outlined in the Policy.

Having reviewed the file in its entirety, we understand that whilst a drain survey has been carried out at the property, no further tests results or reports have been submitted to us which would support the contention that the damage manifest has arisen due to the operation of any insured peril. Whilst we empathise with the situation you find yourself in, we unfortunately are not in a position to further assist until we have been provided with a reasonable level of substantiation to demonstrate that this is a claim for which the Policy should respond to”.

4 September 2012 - File note:

“This claim was previously registered in 2010 and the claim was closed as no documentation was provided by the insd. The insured has now contacted claims to re-open the claim. It has come to light that this property was previously underpinned and the LA is in no doubt that the insd was aware of this. The reserve is 40k and we have a copy of the proposal form. The claim is currently on hold as claims are waiting on the insds engineers report and he is delaying same as he cannot afford to get this done. The proposal form we have on file has a declaration signed by the insd stating that the house is in an area free from flooding, subsidence etc. No exceptions to this declaration are noted. I have written to the insd requesting an explanation for the non disclosure and have diaried a work item with the prop attached on the 18/09/12”.

September 2012 - Provider’s letter of declinature of the claim –

“We wish to confirm that it has come to our attention that the property insured under this policy had a previous history of Subsidence and was previously under pinned. We note from the proposal form on file that this information was not disclosed to us when the policy was taken out in February 2005.

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The declaration on the proposal form states that: "The home is in an area which is free from flooding, subsidence, heave, landslip, coastal or river erosion". There have been no exception to this declaration noted on the proposal form in the section provided.

Due to this non disclosure we require a written explanation from you outlining full details of the previous subsidence issue and advising why you did not disclose this information at the inception of the policy".

13 September 2012 – Complainants to the Provider

"I am replying to your letter ... The reason I ticked the box saying Yes to "The home is in an areas which is free from flooding, subsidence, heave, landslip, costal or river erosion" was because for two reasons.

Reason No 1. The house was underpinned and drainage replaced by .. Construction and supervised by ... Engineers in October 2004.

Reason 2. I presumed that the engineers report I received prior to getting approval for my mortgage would have been sent to yourselves as well as the bank, I thought this was standard best practice as at the time the bank advised me that I would not be approved for my mortgage without the said report meaning I would not have needed home insurance. The underpinning and drainage works were done prior to me purchasing the house so it was my understanding that the issue with subsidence was resolved that is the reason I said Yes to the question"

13 September 2012 – Provider

"Following a full review of this file I have decided to cancel this policy ab initio and return all premium paid to the insured. I have e-mailed .. [Bank] confirming that we are taking this action and have given them until close of business on the 24/09/12 to revert with any questions or we would proceed with my decision".

19 September 2012

"[Insurance Intermediary] has emailed back and advised that they are aware of this case and she has asked the branch to forward a copy of what was submitted when he applied for his mortgage".

4th October 2012 – File note

"I have received a reply back from [Insurance Intermediary] with a copy of the engineers report from their file. I have referred the case to Portfolio for a second opinion as the report mentions the underpinning. Please ensure our final decision is confirmed to [Insurance Intermediary] when made"

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5 November 2012- Loss Adjuster to the Complainants

"Further to our conversation on Friday last, I confirm that I have obtained agreement from [the Provider] to get the drains tested independently at no cost to yourself".

20 November 2012 – Engineering Report appointed by the Provider

"Discussion

It is clear that the cracking to the property and in particular the major diagonal cracking to the rear elevation was evident at the time of purchase in 2005. The crack patterns are recorded in the pre-purchase survey of Mr ...

In addition the crack patterns were sufficient to prove an escape of water / subsidence issue which was dealt with by the previous owner.

The property was underpinned in 2004 to include replacement of the drainage system within the boundaries of the site.

Having reviewed the crack patterns we would consider that, in general, the cracking observed in November 2012 is similar in nature to that noted at our initial inspection in August 2010. There does not appear to be any significant increase in cracking in terms of pattern or magnitude. However, it would be prudent to complete a period of monitoring with crack monitors being installed at appropriate locations, before drawing any firm conclusions in relation to the cracking.

However, we would recommend that before commencing any such monitoring period, any leak identified on the drainage system would need to be rectified to ensure that the system is leak free".

5th December 2012 – Provider's Loss Adjuster

"We are recommending that the property be monitored to establish whether there is current and ongoing movement at your property as opposed to normal settlement following the introduction of underpinning in 2004.

[F]or a valid claim to arise the damage must be shown to have resulted from one of the insured causes outlined in your policy. Whilst we note that the door at the rear of your property has become "stuck" and that there are cracks in the property, it is clear that the crack patterns were noted at the time of purchase in 2005. It is not possible to confirm whether the cracks have become worse or not since then without monitoring them for a period of time.

In regard to the above we would ask that you repair / replace the leaking underground drainage pipework immediately and contact our adjuster to advise

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when you will be installing crack monitors so that our Consultant Engineer can attend to on site to agree the locations where the monitors should be installed and also take readings of the monitors from the outset”.

20 May 2013 – Provider to the Complainants

“We are writing to let you know that we have cancelled your insurance policy with effect from 15 April 2013” [Policy cancelled for non payment of premiums]

The Complaint for Adjudication

The complaint is that the Provider has not acted correctly or reasonably in relation to the assessment of the claim.

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 Complainants were 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 14th June 2019, 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.

The only submission from the parties were as regards the payment of the compensation and to whom the monies were to be paid to. On **24 June 2019** the Second Complainant advised that she and the First Complainant were now divorced and that the compensatory

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payment was to be split equally and two separate payments were to be made, as they do not have a joint account. In an e-mail of **24th June 2019**, the Provider advised that it does not wish to appeal the Decision, but wished to advise that a Bank is noted on the Proposal Form as having a Third Party interest on the policy. The Provider stated that the cheque in respect of its indemnity under the policy would therefore be made payable to the insureds and Bank jointly. In this regard I advised the Bank by way of letter dated **11 July 2019** that in the circumstances where the compensatory payment is intended to be in respect of the Provider's interactions with the Complainants when they were pursuing the property damage insurance claim, and where that claim itself was not admitted by the Provider, the compensatory payment is to go directly to the Complainants and not to the Bank.

This Decision and compensatory payment do not involve a direction for the Provider to admit the claim under the policy. Therefore, the compensatory payment is not in respect of the Provider's indemnity under the policy.

The Provider acknowledged the above position by way of e-mail dated **11th July 2019**.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

Analysis

It is not for this office to establish whether the property is suffering damage from subsidence or otherwise, but our role is to examine and establish whether the Provider has correctly administered the claim and whether the Provider has acted correctly and reasonably in its dealings with the Complainants during the course of a claim.

I accept that greater assistance could have been given by the Provider to the Complainants when they submitted the Claim in 2010. The Provider's initial response was that the Complainants had non-disclosed at inception in 2005 the issues that had existed with the property prior to that date, that is that there was underpinning of the property and that drains were replaced.

In the above regard the following questions were asked of the Provider by this office:

"4. The Complainant states that he purchased the home insurance from [the Bank]. As [the Bank] also arranged the mortgage, does the Provider accept that the seller of the home insurance would have been aware, from the approval documentation submitted by the Complainants, that the property had previously been underpinned?"

The Provider's response was that:

"4. This is a question for [Insurance Intermediary]. I can confirm that [the Architect's Report] of 26th January 2005 and [Consultant Engineer's] letter of 18th October 2004 are on our underwriting file with the proposal form. We are not aware if [Insurance Intermediary] or [the Bank] had any additional information".

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This office referred the Provider to the Home Cover Proposal Form at Section A - where it refers to: "Call from ... Branch – Branch Name: ...Branch Phone No:...". This office then asked:

"What does this mean? Does it mean that the Bank arranged the cover with the intermediary?"

If the agency is a tied agency can the Provider please submit any telephone recording in relation to the setup of this policy by its intermediary".

The Provider's response was that:

"This information related to the ..where the insurance business originated from. The Branch would have arranged cover with [Insurance Intermediary] who subsequently placed it with [the Provider]. As stated this is not a tied agent".

This office also asked the Provider the following questions:

"The [First] Complainant has stated that he presumed the engineers report he received prior to getting approval for his mortgage would have been sent to [the Provider] as well as the Bank. Can the Provider advise whether the Provider or its agent received the said report prior to approval of the mortgage?"

"Please confirm that this a Group / Block policy and whether with such policies the Provider would enquire and receive such information from the Bank on the property it was going to insure".

The Provider's response to the above questions were as follows:

"I confirm that [the Provider] did have the engineers report. I have no information with regard to the approval of the mortgage". And

"This was originally part of a block policy. There was an administrative change in 2009 when [the Provider] took over the issuing of the documentation to the customer and the servicing of the policy from 2009. The information provided to [the Provider] is stated in answer 4 above".

Therefore, it can be seen that the Provider had in its possession in 2005, the details of the works that had previously been undertaken at the property, that is the report showing that there was underpinning of the foundations and that there was replacement of the drains at the property, all of which happened prior to the Complainants' purchase of the property.

The Provider had taken on the risk on this property in 2005 knowing that the property previously had these structural problems. The Provider did not specifically exclude from the policy, damage resulting from the cause that led to the underpinning and replacing of the drains.

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When the Complainants submitted their claim in relation to the problems they were having with the property, the Provider specifically referred to a non-disclosure by the Complainants of material facts. The Provider did this despite the fact that it knew from inception of the policy of the said material facts it was relying upon when claiming non disclosure. It is well established that anything which is already known or presumed to be known by an underwriter, need not be revealed by an Insured.

While the Provider did not void the policy for non-disclosure, it nevertheless raised this allegation and does not appear to have retracted it or apologised to the Complainants for this.

It was not until November 2012 that the Provider took some proactive steps with regard to establishing what was causing the damage to the Complainants' property. A second inspection of the property was arranged by an Engineer at the Provider's expense and a drains test / CCTV survey was carried out, again at the Provider's expense. Up to this point the Provider had alleged non disclosure and was requiring the Complainants to provide all the proofs.

It was not until very late in the claim / complaint (11 February 2019 when responding to this office's queries) that the Provider accepted that it did have the knowledge of the previous structural problems from the 2005 Architect's reports showing the underpinning and replacement drain issues with the property. Its possession of this information was prior to it offering the insurance to the Complainants in 2005.

In its letter of 11th February 2019 the Provider also states:

"[The Provider] do not dispute that there is structural damage to the insured's property. The issue here is that it predates the cover with [the Provider] as it is referred to in [the Architect's] report (paragraph 2) from January 2005".

I consider that for all intents and purposes the Provider was refusing to admit the claim because the Complainants did not provide the proofs showing that the damage they were claiming for was not the same damage that was evident before they took out the insurance cover. In effect, the Provider was invoking an exclusion for pre-existing damage and in that respect I consider that the burden of proof had shifted from the Complainants to the Provider to show that the damage was pre-existing as opposed to anything else. The method of proving this was clearly spelt out to the Complainants by the Provider, that is:

"to complete a period of monitoring with crack monitors being installed at appropriate locations and that any identified leaks on the drainage systems would be rectified to ensure the system is leak free".

I consider that here the Provider incorrectly and unreasonably expected the Complainants to prove this issue and to pay monies out to establish and rectify matters to prove same.

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The Provider's Engineer explains what would happen after the above steps were undertaken, that is:

"In the normal course of events, if progressive structural movement is identified, then the next step would be to commission further investigations by way of dynamic probing/sampling to assess in detail the nature of the underlying ground conditions. It is only at that stage that an assessment could be made in relation to whether the property is suffering from on-going subsidence".

Again I consider that as the burden had shifted to the Provider once the Provider alleged or alluded to pre-existing damage, it was the Provider's role to follow through on the above identified steps to establish whether or not the property damage was the same as that which was in existence from the outset. Unfortunately, for the Complainants and their family, this did not happen, and I accept that many consequences followed from this inaction by the Provider. The Complainants have pointed to both financial and medical issues flowing from the unresolved defects in the property.

Having regard to all of the above, it is my Legally Binding Decision that the complaint is substantially upheld. As the property is no longer in the Complainants' ownership I cannot direct any action by the Provider in relation to the property itself, but I do consider that the most appropriate remedy for the Complainants is a substantial compensatory payment from the Provider and I direct accordingly. The amount of the compensatory payment that I direct the Provider to pay the Complainants is €60,000 (sixty thousand euro). The compensatory payment is to be made, in two equal payments of €30,000, to the individual accounts of the Complainants.

Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is substantially upheld, on the grounds prescribed in **Section 60(2)(g)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €60,000 (€30,000 each). The payments are to be made to the accounts of the Complainants' choosing, within a period of 35 days of the nomination of account details by each Complainant to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said accounts, within that period.
- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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

16 July 2019

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.