



**Decision Ref:** 2020-0046

**Sector:** Insurance

**Product / Service:** Household Buildings

**Conduct(s) complained of:** Rejection of claim

**Outcome:** Rejected

**LEGALLY BINDING DECISION  
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

The Complainant, a limited company operating as the management company on behalf of the owners and residents of an apartment block, incepted an apartment block insurance policy with the Provider on 17 July 2017.

**The Complainant's Case**

The Complainant's broker notified the Provider on 28 May 2018 of water damage to the floors and window frames at one of the apartments covered by its policy. The apartment in question is privately owned by Mr A. C. The Complainant and Mr A. C. both submit that the water damage was caused by storm. Following its assessment, however, the Provider declined this insurance claim as it concluded that the loss was due to a design or construction defect of the windows, a cause that is specifically excluded from cover in the policy terms, and that the genesis of the issue pre-dates the commencement of the policy cover and would therefore be excluded from liability, in any event.

In this regard, the Complainant sets out its complaint, as follows:

*"In May 2018 we noticed significant damage to the interior wooden frames of our windows. We concluded that the damage was caused by rain water penetrating the windows during severe weather conditions. We submitted a claim under the buildings section of the block policy covering the apartment complex. The policy provides cover for storm damage and also all risks cover on the buildings.*

*The insurance company inspected the damage and rejected the claim on the grounds that it was not caused by storm damage and while all risks cover is provided, cover was excluded due to faulty design/workmanship”.*

In its email to this Office dated 20 March 2019, the Complainant submits, as follows:

*“One of the key reasons advanced by [the Provider] was that the damage to our windows was caused by defective design of the bay window. Water damage was in a number of other windows (3 in total) and not just the bay window. These windows had also to be replaced based on the advice of the window experts who installed them originally.*

*The other windows are normal windows and not curved as in the bay. The fact that these other windows were also damaged due to water ingress during driving rain etc. further undermines the argument that defective design was the sole or primary cause of the damage”.*

The Complainant seeks from the Provider *“the cost of replacing the damaged windows... €21,288”.*

The Complainant’s complaint is that the Provider wrongly or unfairly declined its insurance claim.

### **The Provider’s Case**

Provider records indicate that the Complainant, a limited company operating as the management company on behalf of the owners and residents of an apartment block, incepted an apartment block insurance policy with the Provider on 17 July 2017. This policy is an All Risks policy, meaning that if any of the property described in the policy schedule suffers damage by any cause that is not noted as specifically excluded in the policy terms, then the policy will operate and the claim will be admitted.

The Complainant’s broker notified the Provider on 28 May 2018 of water damage to the floors and window frames at one of the apartments covered by its policy. The apartment in question is privately owned by Mr A. C. The Provider notes that the Complainant and Mr A. C. both submit that the water damage was caused by storm.

The Provider appointed a Loss Adjuster who itself appointed K. Forensic Engineers to carry out a site inspection to view the damage internally and attempt to determine how the water ingress incurred. K. Forensic Engineers could find no evidence of any part of the windows or surrounding building fabric having been displaced or damaged by storm and was of the opinion that the root cause of the internal water damage was due to a design or construction defect of the windows. The Provider notes that this opinion coincides with the findings of M. T. Architects, who the Complainant itself appointed to investigate the matter on its behalf.

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In this regard, the Provider notes that the investigation carried out by M. T. Architects included opening up the cladding to inspect the segmental/angled arrangement of the bay windows' frames and that this allowed a conclusive determination to be made insofar that the ensuing Report notes an issue with the angled joints between the window frames which resulted in the compressive tape being insufficiently compressed, resulting in the window system being exposed to water ingress during severe rain.

As a result, the Provider concluded that the damage to the glazing and the internal damage did not arise due to a one-off storm incident. The Provider notes that the glazing units are allowing water to ingress during periods of high winds in an easterly direction. Whilst the water may have ingressed during a storm, the Provider is satisfied that the reason for such ingress was a failure of the glazing units to weatherproof the building in such conditions, for which they are designed to do and is the primary purpose of the windows. In this regard, for a policyholder to be indemnified for damage under the storm peril, the building fabric must be damaged or compromised in some way by the storm, such as dislodged flashing, slates etc. The Provider notes that there is no such damage in this instance.

The Provider's decision to decline indemnity was based on the evidence obtained by its appointed experts, along with that furnished by both Mr A. C. and the Complainant itself. In this regard, the Provider concluded that this evidence not only failed to demonstrate that storm was the proximate cause of the loss but that it clearly points towards an issue with the glazing itself which allowed water to ingress during periods of very strong easterly wind driven rain into that façade.

In addition, the Provider also notes that Mr A. C. purchased the apartment in or around April 2017 and the fact that the pre-purchase survey he obtained in February 2017 highlighted the issue at that particular point in time demonstrates that the actual date of loss or commencement of the problem, whether it was proven to be storm or not, falls outside the policy term of cover and is therefore automatically excluded from policy consideration.

As a result, following its assessment, the Provider declined the Complainant's claim as it concluded that the loss was due to a design or construction defect of the windows, a cause that is specifically excluded from cover by the policy terms, and that the genesis of the issue pre-dates the commencement of the policy cover and would therefore be excluded from liability, in any event.

Accordingly, the Provider states that it is satisfied that it declined the Complainant's insurance claim in accordance with the terms and conditions of its apartment block insurance policy.

### **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.

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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 28 January 2020, 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.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

The complaint at hand is that the Provider wrongly or unfairly declined the Complainant's insurance claim.

The Complainant's broker notified the Provider on 28 May 2018 of water damage to the floors and window frames at one of the apartments covered by its policy. I note that the apartment in question is privately owned by Mr A. C. and that both the Complainant and Mr A. C. submit that the water damage was caused by storm. Following its assessment, however, the Provider declined this insurance claim as it concluded that the loss was due to a design or construction defect of the windows, a cause that is specifically excluded from cover in the policy terms, and that the genesis of the issue pre-dates the commencement of the policy cover and would therefore be excluded from liability, in any event.

I note from the documentary evidence before me that following the Complainant's broker notifying the Provider of the loss in question on 28 May 2018, Mr A. C. emailed the Provider directly on 25 June 2018, as follows:

*"I am attaching a copy of the survey report we received prior to the purchase of the apartment. While some signs of damp was evident (i.e. some black patches), the wood frames were solid and showed no signs of rot etc. The moisture meter also showed no signs of any moisture in the wood."*

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*In my opinion the damage was caused by rain get [sic] through the external seals and whether this occurred over time or due to one single event, it only happened when there was extreme weather (i.e. wind and driving rain). It did not happen every time there was rain. Hence in my humble opinion the proximate cause was storm related damage occurring over time perhaps which caused the wood to get badly damaged. Some of this damage I accept may have occurred before [the Provider] went on cover.*

*I think the previous insurer was [X.] and there may be a case for a contribution from them to the cost of the damage as it is possible that they were on cover when some of the storm damage occurred.*

*The biggest evidence we saw of water damage was during the various winter storms in 2017/18 and storm Ophelia in particular, we mopped up the water on each occasion but were not aware that any significant water damage had occurred until the damage became visible over the past few months”.*

In this regard, I note that in the pre-purchase Report prepared for Mr A. C. in February 2017, B. L. Architects advises, among other things, as follows:

*[at p.6] There are signs of intermittent leaks around the bay window in the living room and to a lesser extent around the frame to the dining area.*

*I tested these areas with a moisture meter and they read as “dry” at the time of inspection, however, the staining on the window frames would point to “intermittent” leaking, rather than to a “one off” problem that has been addressed ...*

*[at p.9] I noted signs of damp on the floor and around the window frames of the bay window and to a much lesser extent around the frame of the dining room window ...*

*[at p.11] I do not believe that the signs of damp around the bay window are attributable to condensation, although, because of the exposure and area of glass provided, some level of condensation be [sic] expected there ...*

*[at p.15] I have concerns about the leak around the bay window, particularly as it is almost impossible to pinpoint the exact cause and the client should note the comments above in relation to same”.*

In addition, I note from the documentary evidence before me that the Complainant obtained a report from M. T. Architects dated 1 August 2018, which states, as follows:

*“The...apartment block...is built more or less on an east-west axis. An architectural feature which occurs on both the west and east gables of the building is a five storey high glazed bay window extending the full height of the building.*

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*The bay window has five facets and is made of individual full storey height window frames all bolted together and secured to the building structure.*

*The windows are Velfac aluclad windows. These are timber windows with an aluminium cladding externally. When aluclad windows are sealed into an opening or as in this case sealed to one another the watertight and airtight seal is made at [sic] between the timber frame members.*

*The aluminium cladding should never be sealed so that there is constant air circulation around the aluminium preventing condensation build-up and potential wet rot damage to the timber window frames. Velfac have a particular method of making up composite windows such as these which relies on a compressed resin impregnated sponge tape to provide a watertight and airtight seal between window frames.*

*From my inspection of the bay windows on both the east and west side of the building it was apparent that water ingress was occurring because the seals between the windows was not fully watertight when the windows were exposed to severe driving rain. On the west side of the building leaks were reported around the bay windows when there was severe driving rain from a westerly direction. On the east side of the building leaks were reported following severe driving rain from an easterly direction.*

*In the case of these bays windows each window pane was fixed at an angle to the next because of the faceted bay window panels. It appears the angled joints between the window frames compromised the degree to which each frame could be compressed [against] its surrounding window frames. Consequently the compressible tape was insufficiently compressed so that in severe driving rain conditions weaknesses in the system were exposed leading to water ingress.*

*Each individual window in the bay window was sound. The leaks were occurring at the joints between the windows. There was no practical way to redo the joints because to do so would have required removal of all the windows. A remedial solution was devised which would seal the joints in the bay windows as best as possible in the circumstances.*

*The following remedial works were carried out. The aluminium window cladding was removed to expose the timber frames and timber corner posts where each faceted window frame met the next frame. All the joints between the timber frames were fully sealed with a combination of EPDM sheeting and a compatible mastic. EPDM is a material which can be solvent bonded to other materials and to itself so as to provide a fully watertight seal.*

*On completion of the sealing works the aluminium cladding was replaced”.*

In addition, I also note from the documentary evidence before me an undated Report from N., a windows company, prepared for Mr A. C. regarding his apartment, as follows:

*“We were called to site by [Mr A. C.] to investigate water ingress on the VELFAC V200 Curved Screen in his apartment.*

*The water is appearing in a couple of spots but most notably at the bottom corner of a small fixed unit.*

*It is our opinion that the screen was not installed correctly to allow for a tray detail to drain water away at every alternate floor. Water appears to be flooding the system and has caused the external timber to deteriorate. This in turn is allowing water ingress through the timber.*

*We can see from previous photos taken that there have been remedial works carried out over time. This image show [sic] that concrete slab is load bearing. However, we are not sure that there is sufficient drainage detail allowing water to escape at the base of each floor which is causing the screen to be sitting in moisture at each floor level”.*

As part of its claim assessment, I note that the Provider appointed a Loss Adjustor, who in turn appointed K. Forensic Investigate Engineers to carry out an inspection. Following its inspection on 2 August 2018, I note that in its ensuing Report dated 21 August 2018, K. Forensic Investigate Engineers concluded, as follows:

**“Summary and Conclusions**

*Having inspected the windows...our assessment is that the water ingress and subsequent timber decay has been occurring because of a defect in either the design or construction of the windows, combined with a lack of maintenance.*

*There was no evidence of any parts of the windows or the surrounding fabric of the building having been displaced or similarly damaged by storm-force winds.*

*In our opinion, the widespread nature of the issue – of timber decay affecting multiple parts of multiple windows, on multiple floors of the building – is not consistent with an issue caused by storm-force wind and rain conditions during the previous winter, even the particularly severe conditions that occurred during Storm Ophelia in October 2017.*

*Notwithstanding this, in February 2017 (eight months prior to Storm Ophelia), the water ingress and subsequent damage in Apartment [Number] was already well-advanced when an Architect’s pre-purchase survey resulted in a finding of “intermittent leaking, rather than to a “one off” problem that has been addressed”*

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*We note that the window supplier and the Insured's appointed Architect have both attributed the root cause of the internal water damage to a design or construction defect in the windows.*

*The window supplier has explained how the bay windows were "not installed correctly to allow for a tray detail to drain water away at every alternate floor" and that "Regarding the other units at the apartment a lack of general maintenance since they were installed has caused the external face of the timber to deteriorate over time causing irreparable damage".*

*Having then had the benefit of opening-up the cladding to inspect the segmental/ angled arrangement of bay windows' frames, the Architect has explained how "the water ingress was occurring because the seals between the windows was not fully watertight [as] the angled joints between the window frames compromise the degree to which each frame could be compressed [against] its surrounding window frames. Consequently, the compressible [watertight] tape was insufficiently compressed".*

As a result, I note that in its Report dated 26 September 2018, the Provider-appointed Loss Adjuster concluded, as follows:

*"From our inspection and discussions with apartment owners and receipt of expert advice from [K. F.], we are satisfied that the damage is not as a result of an insured event covered by the policy. Notwithstanding this, we are also satisfied that the damage pre-dates the inception of the policy".*

As a result, the Provider declined indemnity in this matter.

The Complainant's apartment block insurance policy, like all insurance policies, does not provide cover for every eventuality; rather the cover will be subject to the terms, conditions, endorsements and exclusions set out in the policy documentation. In this regard, I note that the 'Material Damage 'All Risks' Section' of the applicable Commercial Combined 'All Risks' Insurance Policy Document provides, among other things, at pg. 12:

***"Exclusions***

*This Section does not cover*

***1. Damage caused by or consisting of:***

*1.1 inherent vice, latent defect, gradual deterioration, wear and tear, frost, change in water table level, its own faulty or defective design or materials*

*1.2 faulty or defective workmanship, operational error or omission, on the part of the insured or any of his employees"*



The onus rests on the policyholder, as the insured, to show that the loss suffered was the result of an insurable peril, for example, storm damage. I am not satisfied that the Complainant, in this instance, fulfilled this requirement.

I accept, having considered the documentary evidence before it, and from which I have cited from above, that it was reasonable for the Provider to conclude that the loss was not as a result of storm damage but was due to a design or construction defect of the windows, a cause that is specifically excluded from cover by the policy terms.

I also accept that it was reasonable for the Provider to conclude from the contents of the pre-purchase Report prepared by B. L. Architects for Mr A. C. in February 2017 that the loss in question had commenced prior to the inception of the policy in July 2017 and was thus automatically excluded from policy consideration.

Accordingly, I accept that the Provider was entitled to decline the Complainant's claim in accordance with the terms and conditions of its apartment block insurance policy.

For the reasons outlined above, I do not uphold this complaint.

### **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**

21 February 2020

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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.

