



<u>Decision Ref:</u>	2020-0082
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Household Buildings
<u>Conduct(s) complained of:</u>	Rejection of claim - subsidence or heave
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns a home insurance policy which the Complainant holds with the Provider. The Complainant made a claim on her policy to “*cover present and future damage through subsidence*”. The Provider denied the claim and declined to indemnify the Complainant in relation to future damage.

The Complainant’s Case

The Complainant entered into a home insurance policy with the Provider, through an intermediary, on **10 April 2006**. This policy is currently still active. Prior to entering into this home insurance policy, the Complainant signed a declaration dated **5 April 2006** stating that her home was located at least 200 metres from any evidence of subsidence.

On **2 March 2010**, the Complainant reported a claim to the Provider. This claim sought an indemnity under the home insurance policy, to cover present and future damage to the property under the peril “*Subsidence and/or heave of the site on which the buildings stand or of land belonging to the buildings or landslip*”.

The Provider says that no claim form was required, as experts were appointed. The Complainant’s engineer’s report dated **25 November 2010** discussed the issues relating to the Complainant’s property and three neighbouring properties. All four properties were constructed on a raft foundation.

The report states that the engineer completed a pre-purchase survey of the property on **10 March 2006** and at that time there was no evidence of any structural cracking or cracking of any significance. The report further states that at the beginning of **2007** considerable cracking was noted at a neighbouring property but the cracking evident at the Complainant's property was of considerable less significance, consisting of 1 or 2 apparent shrinkage cracks along the junction between the walls and the ceiling and what was a small crack on the rear external wall.

As part of the inspection at that time the external drains were examined and were found to be intact with the exception of a leak at the back of the property which was repaired. The Complainant's engineers state that a strain gauge was fitted on **29 August 2008** and no deterioration appeared to be evident on the cracking further to the gauge being fitted and therefore it appeared as if the cracking which had occurred was a result of thermal movement not related to any structural issues.

The Complainant's engineers state that in **November 2009**, the Complainant heard a bang and a crack developed on the rear external wall of the property after significant inclement weather conditions over a continuous period of time. The Complainant points out that given the additional cracking she noted at that time on the front external wall and also within the interior of the property, she was concerned that the property was unstable, and she refused to stay there overnight.

Subsequently, the engineer attended the property and examined the strain gauge where he found that significant movement was noted and that more significant cracking had developed. The Complainant's engineers state that at this stage it had a third-party construction company examine the water main which showed no leakage and it also had the external drains re-tested which showed new significant leakage. The Complainant's engineers state that the external drains are located above the raft foundation and so are not the cause of the problem. I

It is the opinion of the Complainant's engineers that the cause of the damage to the property:

"appears to relate to the excessive water seeping through the ground and causing subsidence of the sub base material."

By email dated **29 September 2018**, the Complainant wrote to this Office to emphasise that the basis of the Provider's position is that the property has a 'design flaw' which has caused the current structural issue with the property and that this design flaw means that the damage caused is not covered under the policy. The Complainant states that this allegation has not been supported by reference to the actual drawings of the property showing clear and concrete evidence of a design flaw.

In a further submission via letter dated **26 November 2018**, solicitors for the Complainant state that:

“At the outset we note that [the Provider] is continuing to ascribe the difficulties the house is suffering from as being based on a design fault. In particular one would have assumed that were a design fault being blamed, then the plans and drawings on foot of which the property was constructed would be adduced in evidence to support this. It is telling that no such evidence has been provided by way of reference to the original design drawings.

Solicitors for the Complainant further make the point in this letter that even if the damage to the Property complained of does not fall within the first part of the peril, namely “subsidence”, it should fall within the latter part of the category,

“heave of the site on which the buildings stand or of land belonging to the buildings or landslip”.

In a further letter dated **4 December 2018**, in response to correspondence from the Provider’s engineers, solicitors for the Complainant state that it is manifestly incorrect to describe the Provider’s position as purely fact based. Solicitors for the Complainant state that the Provider has drawn a series of inferences without examination of the design plans and specifications and that it is inequitable for the Provider to deny cover on the basis of a design fault which the Provider cannot conclusively establish. Furthermore, solicitors for the Complainant state that the settlement of the property, causing the cracks, clearly comes within the ambit of the peril covered.

Ultimately, the Complainant wants the Provider to repair any damage to the property in addition to reimbursing all professional costs including witness expenses and all costs or expense arising from consequential losses, as a result of the damage to the property.

The Provider’s Case

The Provider appointed a loss adjustor to investigate this claim and a representative from the loss adjustor visited the Complainant’s property in **March 2010**. Following on from that visit, on **23 April 2010**, the Provider appointed a firm of structural engineers to investigate the matter further. An inspection of the Complainant’s property was carried out by a representative of the Provider’s engineers on **2 May 2010**.

In **April 2011**, soil sampling was carried out by a third- party specialist at the request of the Provider’s engineers. This soil sampling involved a ground investigation comprising cable percussion, window sampler boreholes, in situ testing and laboratory testing.

The report furnished by the Provider’s engineers, issued on **28 June 2011**, stated that:

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“The cracking/structural movement in the block under consideration has been ongoing since at least 2006. This was only 1-2 years after the buildings were completed.

The pattern of cracking noted indicates a downward movement of the two gable end units which is causing relief cracking to develop in the two middle units.

The claim that the problem is being caused by water escaping from a leaking drain is not sustainable. The only leaks identified are localised at the rear of one of the mid terrace units with a further leak towards the front of the same unit. The nature of the problems in these pipes is such that little or no water would escape during normal working conditions. There is no leakage on the drainage systems around the two gable end units.

The property is constructed on a raft foundation which is built on fill materials of varying depths. This fill material overlies a predominantly clay material. The probing results indicate that this clay is of low bearing capacity.

The timing of events with the cracking ongoing since approximately 2 years after construction were completed coupled with the nature of the cracking itself and the fact that it is replicated in other units within the estate would appear to indicate that the problem is due to excessive settlement of the gable end units on the raft with subsequent relief cracking developing in the mid terrace units.

This would appear to be a design issue and it would appear to indicate that either the raft was not sufficiently stiff enough to resist the additional forces created by this differential settlement or the use of a raft was not appropriate given the underlying ground conditions and the building layout.”

On **1 July 2011**, the Provider’s loss adjustor wrote to the Complainant declining the claim and quoting in full the above citation from the Provider’s engineer’s report. The Provider went on to state that:

“it is apparent from the Provider’s engineer’s advices that the cracking in the property is not as a result of an insured peril but is due to poor workmanship and poor design. According (sic) you will appreciate that at this time; we are unable to instruct the Provider to make a payment in this instance.”

On **5 July 2011**, the Provider’s loss adjustor wrote to the Complainant’s engineer again quoting in full the above citation from the Provider’s engineer’s report and further stating that:

“Based on the advises (sic) of the Provider’s engineer, we are of the view that the cracking in the property is not as a result of an insured cause, and falls within the meaning of the following policy exclusions:-

'We do not Insure:

4. Wear and Tear, Maintenance, Breakdowns and Gradually Operating Causes

- *Wear and tear, rusting or corrosion*
- *Wet or dry rot, fungus, mildew or any other gradually operating cause*
- *Frost (other than bursting water tanks, pipes or appliances caused by freezing), atmospheric or climatic conditions (other than lightning, storm, flood or earthquake)*
- *Damage caused by cleaning, repairing, restoring, renovating or dyeing*
- *The cost of maintenance and normal decoration*
- *Failure of double-glazing seals*
- *Mechanical, electrical or electronic computer failures or breakdowns or breakages*
- *Damage caused by assembling or dismantling of any apparatus*

7. Defective and Faulty Workmanship

- *Loss or damage caused by faulty workmanship*
- *Loss or damage caused by defective design or the use of defective materials.'*

Accordingly, we hope you will appreciate that we are unable to instruct the Provider to make a payment in this instance"

Responding to the complaint made to this Office in a letter dated **25 October 2018**, the Provider states that the Complainant's claim was declined on the basis that an insured peril did not operate. Noting that the claim had been made under the peril "*Subsidence and/or heave of the site on which the buildings stand or of land belonging to the buildings or landslip*", the Provider stated that there was no evidence that the damage was caused by subsidence and further stated that the cracking and structural movement indicated downward movement to the two gable end units which was the cause of the relief cracking in the middle two units, one of which is the Complainant's property. The Provider stated that the above had been confirmed following extensive investigation which was reported in the Provider's engineer's report and the soil sampling report.

The Complaint for Adjudication

The complaint is that the Provider wrongfully refused to admit and pay the Complainant's 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 10 February 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.

Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

I note that there is a clear conflict between the expert engineering reports furnished to this Office from the Complainant's engineer and the Provider's engineer. The Complainant's engineer quite clearly states that the cause of the damage to the property:

"appears to relate to the excessive water seeping through the ground and causing subsidence of the sub base material"

The engineer for the Provider states that the cause of the damage to the property:

"would appear to be a design issue and it would appear to indicate that either the raft was not sufficiently stiff enough to resist the additional forces created by this differential settlement or the use of a raft was not appropriate given the underlying ground conditions and the building layout"

I further note that at page 59 of the Complainant's policy, as renewed in 2009, the following exclusion is contained:

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"We do not insure

7. Defective and Faulty Workmanship

- *Loss or damage caused by faulty workmanship*
- *Loss or damage caused by defective design or the use of defective materials."*

The FSPO is not an engineering expert and its function is not to adjudicate on conflicts of engineering opinion. In considering this complaint, the function of this Office as confirmed by the High Court in *Baskaran v Financial Services* [2019] IEHC 167, is *"in general terms, is to assess whether or not the Provider acted reasonably, properly and lawfully"* in declining the claim of the Complainant and furthermore in declining to indemnify her in relation to future damage.

In that regard, considering the detailed engineering report of the Provider, the accompanying soil tests, and the exclusion policy for defective and faulty workmanship, I accept that the Provider had sufficient evidence before it to come to the conclusion that the damage caused to the Property was a design issue, and not due to excessive water seeping through the ground and causing subsidence.

I note in that regard an engineering report dated August 2016 instructed by the Complainant's solicitors, which included a desk study of the information available, including the Provider's engineering report of August 2011, and a site visit including a visual assessment of the property, including the crack patterns, and which also reviewed the site testing in the form of:-

- Hydrostatic Drain Testing.
- CCTV inspection of drains.
- Soil mechanics.

This report instructed by the Complainant's solicitors, ruled out a design fault as the cause of the cracking to the property, and indeed ruled out any leaking/water escape from drains as the cause. The report came to the conclusion that the cause of cracking indicated either settlement cracking from the settling of the building, or settlement due to the building materials drying out. The summary of the report confirmed that the cracking was due to normal settlement and was within acceptable limited. At that time, some 6 years after the Complainant had made her claim on the policy, the engineer considered the cracks to be cosmetic in nature and the building was considered fit for purpose.

I note that within this report there was no suggestion that the cause of the cracking was subsidence or land heave, as suggested by the Complainant.

Accordingly, whilst no doubt the Complainant feels very frustrated, I must accept that the Provider was entitled under the terms and conditions of the policy to deny the claim and to decline to indemnify the Complainant as she wished.

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Accordingly, for the reasons outlined above, on the basis of the evidence before me, I take the view that this complaint cannot be upheld.

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.

**MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES**

11 March 2020

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.