



<u>Decision Ref:</u>	2020-0229
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Household Buildings
<u>Conduct(s) complained of:</u>	Rejection of claim - freezing or escape of or overflow of water or oil Rejection of claim - non-disclosure & voiding
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant incepted a home insurance policy with the Provider in **November 2014**. The Complaint made a claim under his insurance policy in **November 2016**. The Provider declined the claim and declared the policy void from inception on the grounds of material non-disclosure.

The Complainant's Case

The Complainant states that in **November 2016** there was an escape of water at his property which led to substantial damage requiring significant repair work. The property was insured with the Provider at the time of the incident. The Complainant states that the Provider did not accept his claim under the policy and also cancelled his policy. The Complaint states that the Provider advised him that there was material non-disclosure at the inception of his policy and the policy was accordingly void. The Complainant states that the non-disclosure is in relation to an engineer's report he commissioned at the time of purchasing the property in order to satisfy himself that there were no significant defects with the property. The Complainant states that there was a question on the proposal form asking if there was an engineer's report in respect of the property. The Complainant states that:

"[d]ue to an oversight on my part, I answered this question incorrectly and said that there was not a report. I don't deny that failing to mention the report on the proposal form was careless on my part but I argue strongly that it was not material to my claim."

The Complainant states that the Provider interpreted the report, which he immediately furnished to the Provider during the course of his claim, quite differently to him and argued that cover would not have been provided in respect of the property had it been aware of the contents of the report.

The Complainant states the Provider argues that, on the basis of the report, the property was exhibiting signs of subsidence and because of this cover would not have been offered. The Complainant states that it is important to note that the claim he made was in respect of an escape of water and was completely unrelated to subsidence and that this is backed up by engineering reports.

The Complainant states that in the report, the engineer never mentioned that subsidence was an issue. Nor, he states, did the engineer recommend any further investigative work in relation to subsidence or any underpinning in respect of the property. The Complainant states that the report mentions cracking but this was viewed as normal settling for a property of that age. The Complainant submits that had there been a significant problem with subsidence he would not have purchased the property. The Complainant states that:

"[t]he report satisfied me that the property was in reasonable condition for its age, based on the engineering evidence."

The Complainant states that he answered the questions contained in the proposal form in good faith. He states that one of the questions on the form asked if the property was free from signs of damage related to subsidence, landslide or heave. The Complainant states this question relates to damage or cracking in the context of the subsidence contingency and that:

"I am not an expert and, as mentioned, engaged an Engineer to act on my behalf and said Engineer made no reference to subsidence or structural issues. The Underwriters drafted the wording and I interpreted it accordingly".

In that respect, the Complainant submits there was no material non-disclosure as he relied on the contents of the report to complete the proposal form. The Complainant states that he did not apply for subsidence cover and one of the stipulations in the policy is that such cover was not provided by the policy.

The Complainant states that as part of a re-examination of his claim, the Provider requested that the original engineer conduct another inspection of the property. The Complainant states that the Provider claimed the damage occurred as a result of subsidence, potentially due to subsoil or independent movement of the ground which is excluded under the policy. The Complainant submitted:

"[t]his was an extraordinary position for [the Provider] to adopt given that the second engineer report concluded that there was still no signs of subsidence at the property following the second inspection".

The Complainant submits that *“[i]t is my belief that [the Provider] knew their initial rejection of the claim was on extremely shaky grounds and they sought to hedge their bets by arguing that the reason for the claim was subsidence-related, as this was not covered by the policy”*. The Complainant argues that this is in direct contradiction to all of the engineering evidence relating to his claim. The Complainant states that the Provider took an extremely long time to deal with his claim, with the subsequent challenge and complaint taking approximately one year. The Complainant states that the Provider *“... sought to deflect my complaints ...”* by suggesting that he deal with the [Coverholder] and follow its complaints process as well. The Complaint states that he has *“... no business with [the Coverholder] – my contract was to [the Provider] and they should not be trying to deflect my complaint as I have no control over who they subsequently use to underwrite their insurance policies.”*

The Provider’s Case

The Provider states that the Complainant signed and dated a proposal form on **13 November 2014**. The Provider submits that the Complainant would have read the declaration contained on the form in respect of non-disclosure or misrepresentation of material facts and the following statement:

“This proposal and the information provided in connection there with contain statements upon which underwriters will rely on in deciding to accept this insurance”

The Provider states that the proposal form asks if the property is free from signs of damage due to subsidence, landslip or heave such as internal or external cracks and the Complainant answered ‘Yes’. The Provider acknowledges that while there was no mention of subsidence in the report, the property did show that there were cracks to the front, side and rear external walls. The Provider submits that cracking should be disclosed on the basis that it is a material fact.

The Provider states that the proposal form also asks if the property has ever been the subject of a survey which mentions settlement or movement of buildings. The Complainant answered ‘No’ but it states that the report:

“... clearly states that the external walls are showing the effects of rising damp and structural movement and also states that there is ongoing structural movement of the external walls”.

The Provider submits that the Complainant was:

“... fully aware the property was suffering from significant cracking of external walls, water damage to ceilings and there was rising damp present in the external walls.”

The Provider further states that this was *“... not only evident to the naked eye ...”* but also evident from the report of **4 September 2014**. The Provider states that the subsequent report dated **30 May 2017** notes that the cracking to the front, side and rear of the property had not been repaired since the original report in **September 2014**.

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In respect of the Complainant's submission that his claim was unrelated to subsidence, the Provider states that *"...we would agree that the claim is unrelated to subsidence ..."* however, had the Provider been made aware of the damage to the property prior to the inception of the policy cover would not have been provided. The Provider stated, in an e-mail of 15 May 2018, that any argument around the relevance of the claim to the non-disclosure is invalid *"... as underwriters would simply not have been on risk in the first place."*

The Complaint for Adjudication

The complaint for adjudication is that the Provider wrongfully and unreasonably voided the Complainant's policy, wrongfully declined the Complainant's claim under the policy and delayed unreasonably in dealing with his 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 Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

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

A Preliminary Decision was issued to the parties on 8 May 2020, outlining my preliminary determination 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 issue of my Preliminary Decision the Complainant e-mailed this office on 25 May 2020 to advise that *"when the insurance company cancelled my policy in 2017, they issued me a cheque for 1153.76 euros to refund premium that I had paid. I didn't cash the cheque because I disputed their decision ... I have also made contact with the insurance company directly on this and they have agreed to reissue the cheque"*.

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A copy of the Complainant's e-mails were transmitted to the Provider for its consideration.

The Provider has not made any further submission.

Having considered all of the submissions and evidence furnished to this office by the parties to this Office, I set out below my final determination.

Engineer Reports

A Structural Report dated **4 September 2014** was prepared in respect of the property. I would draw attention to the following sections from this report:

6.0 Externally

The property is in reasonable order. Drainage from the dwelling is done in an ad-hoc manner with roof drainage discharging directly on to the public footpath.

...

7.0 Floors

... This generally appears to be in reasonable condition. However, as outlined on section 8.0 below, the external wall are effected by rising damp.

...

8.0 External Walls

... The external walls are suffering the effects of rising damp and structural movement.

...

There is some ongoing structural movement to the external walls. This is particularly evident at the front (closest to the junction with the front boundary wall), to the rear (mid right) and at the junction between the two storey section and the single storey annex. Photographs 8.1 and 8.2 below show examples of this cracking.

...

The cracking to the external walls appears to be an ongoing issue with this property. It appears that the cracking has been repaired in the past and has continued to re-present. If the property is purchased we advise that an allowance should be made for on going crack repair.

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9.0 Internal Partitions

The internal partitions are all generally in reasonable condition for a property of this age and nature.

...

12.0 Ceilings

All ceilings ... are in varying condition from reasonable to poor. The ceiling in the southern part of the kitchen is in poor condition, having suffered the effects of water damage. There was a leak here at some stage in the relatively recent past. The ceiling in this area is to be replaced."

The Proposal Form

When applying for insurance cover in respect of the property the Complainant filled out and signed a proposal form dated **13 November 2014**. The relevant parts of the form state:

"BEFORE ANY QUESTION IS ANSWERED, READ THE NOTES AND THE DECLARATION AT THE END OF THIS PROPOSAL WHICH YOU ARE REQUIRED TO SIGN.

...

ABOUT YOUR PROPERTY

...

7c. Is the property in a good state of repair and free from damage or defect of any kind?

If no, provide details

...

7q. Is the property in an area which is free from flooding? If no, provide details.

...

7s. Is the property free from signs of damage due to subsidence, landslip, or heave (such as internal or external cracks) and not in an area where there has been or is evidence of these causes.

If no, provide details

...

7u. Has the property ever been the subject of a survey which mentions settlement or movement of buildings? If yes, enclose a copy of this report.

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DECLARATION

To the best of my knowledge and belief the information provided in connection with this proposal, whether in my own hand or not, is true and I have not withheld any material facts. I understand that non-disclosure or misrepresentation of a material fact may entitle Underwriters to void the insurance. (N.B. A material fact is one likely to influence acceptance or assessment of this proposal by Underwriters: if you are in any doubt as to whether a fact is material or not you must disclose it in this space below).

This proposal and the information provided in connection there with contain statements upon which Underwriters will rely in deciding to accept this insurance. Should a contract of insurance be concluded this proposal will form the basis of the insurance."

Declination of Claim

The Complainant submitted a claim under the policy in **November 2016**. By letter dated **13 April 2017**, the Provider wrote to the Complainant informing him that the Provider's underwriters had declined his claim and instructed that the policy be cancelled due to non-disclosure on the proposal form. In respect of the non-disclosure, the letter states:

"We enclose a copy of the completed proposal form and would refer you specifically to your answers to questions 7c and 7q. Had we been made aware that there was structural moving and cracking to the property we would not have accepted the risk unless the damage had been professionally repaired and an engineer's report submitted confirming this."

In its Final Response letter to the Complainant dated **4 January 2018**, the Provider states:

"I refer you to our original letter of cancellation dated the 12th April 2017 in which we advised [the Provider's] underwriters declined your claim and instructed that the policy be cancelled ab initio (from the beginning) due to non-disclosure on the proposal form of the following reasons:

- *Question 7C. The proposal form asks if the property is free from defects of any kind.*

You answered "yes" but clearly the property was suffering from significant cracking of external walls, water damage to ceiling and there was rising damp present in external walls. This was not only evident to the naked eye but was pointed out in [the engineer's] report of 4th September 2014.

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- *Question 7S. The proposal form asks if the property is free from signs of damage due to subsidence, landslip or heave (such as internal or external cracks) and you answered “yes”. Whilst [...] is right when he says there was no mention of subsidence in [the engineer’s] survey, the property did show that there were cracks to the front, side and rear external walls. Cracking should be disclosed on the basis that it is a material fact.*
- *Question 7U on the proposal form has also been answered incorrectly. It asks if the property has ever been the subject of a survey which mentions settlement or movement of buildings.*

You answered “no” but [the engineer’s] survey clearly states that the external walls are showing the effects of rising damp and structural movement and also states that there is ongoing structural movement of the external walls. We note that [the engineer’s] report dated 30th May 2017 states that the cracking to the front, side and rear had not been repaired since his original visit on the 4th September 2014.

- *Our proposal form clearly states that “non-disclosure or misrepresentation of a material fact may entitle Underwriters to void the insurance. (N.B. A material fact is one likely to influence acceptance or assessment of this proposal by Underwriters: if you are in any doubt as to whether a fact is material or not you must disclose it in this space below).*

Whilst we understand that this is an escape of water claim we would like to reiterate that underwriters have maintained their original decision of cancellation from inception and declinature of your claim due to the non-disclosure on the proposal form.”

Law on Material Non-Disclosure

The test for materiality has been set out by the Supreme Court in ***Chariot Inns Ltd v Assicurazioni Generali S.p.a. and Coyle Hamilton Hamilton Phillips Ltd*** [1981] I.R. 199 at 226, as follows:

“What is to be regarded as material to the risk against which the insurance is sought? It is not what the person seeking insurance regards as material, nor is it what the insurance company regards as material. It is a matter or circumstance which would reasonably influence the judgment of a prudent insurer in deciding whether he would take the risk, and, if so, in determining the premium which he would demand. The standard by which materiality is to be determined is objective and not subjective. In the last resort the matter has to be determined by the court: the parties to the litigation may call experts in insurance matters as witnesses to give evidence of what they would have regarded as material, but the question of materiality is not to be determined by such witnesses.”

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This decision is generally accepted as the main authority relating to materiality and the duty of disclosure in Ireland.

In *Earls v Financial Services Ombudsman* [2015] IEHC 536, the High Court reviewed the case law on non-disclosure in insurance contracts and summarised the applicable principles as follows:

“1. Utmost good faith

(1) A contract of insurance is a contract of the utmost good faith on both sides. (Aro Road).

2. Disclosure of material matters

(2) The correct answering of questions asked is not the sole duty of the insured. S/he must disclose all matters which might reasonably be thought to be material to the risk against which s/he is seeking indemnity. (Chariot, Aro Road).

(3) The duty involves exercising a genuine effort to achieve accuracy using all reasonably available sources. (To require disclosure of all material facts may well require an impossible level of performance). (Aro Road).

(4) The form of questions asked in a proposal form may make the applicant's duty to disclose more strict than the general duty arising; it is more likely, however, that the questions will limit the duty of disclosure. The acid test is whether a reasonable person reading the proposal form would conclude that information over and above that which is in issue is required. (Kelleher).

3. Test of materiality

(5) Materiality falls to be gauged by reference to the hypothetical prudent insurer. (Chariot).

(6) Absent a question directed towards the disclosure of a particular fact, the arbiter must give consideration to what a reasonable insured would think relevant; relevance in this particular context is not determined by reference to an insurer alone. (Aro Road).

Analysis

At the time of completing the proposal form the Complainant had an engineer's report in respect of the property that was approximately 2 months old. The Complainant answered Yes, Yes, Yes and No to questions 7c, 7q, 7s and 7u on the proposal form as set out above.

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The Provider declined the Complainant's claim under the policy and cancelled the policy on grounds of non-disclosure. In its letter dated **13 April 2017**, the Provider referred to questions 7c and 7q of the proposal form stating that had it been aware there was structural movement and cracking to the property it would not have accepted such a risk unless the damage had been professionally repaired and an engineer's report submitted confirming this. In its Final Response Letter dated 4 January 2018 the Provider cited the Complainant's answers to questions 7c, 7s and 7u as the basis for its decision to refuse the claim and cancel the policy.

Having considered the evidence of the parties to this complaint, the documents outlined above and relevant law in this area I find that, on the basis of the information available to him, the Complainant did not answer questions 7c, 7s and 7u correctly. In particular, I note that the engineer's report contained information that was both relevant and material to the questions contained in the proposal form.

The answers given by the Complainant to those questions are not consistent with the information contained in the report and available to the Complainant at the time of completing the proposal form. Furthermore, the Complainant did not furnish the Provider with a copy of the report. This report is clearly relevant to question 7u.

I accept that the Provider was entitled to decline the Complainant's claim and cancel the policy on the grounds of material non-disclosure as a result of the answers provided to questions 7c, 7s and 7u of the proposal form and the Complainant's failure to enclose a copy of the report with the proposal form or to confirm its existence.

In such circumstances, I cannot uphold the second aspect of this complaint. The Provider was entitled to declare the policy void ab initio and as a result of this the Complainant is not entitled make any claim under the policy even if such a claim does not relate to the answers provided to questions 7c, 7s and 7u of the proposal form.

Finally, in relation to the third aspect of this complaint, the Complainant states that it took one year to deal with his claim, subsequent challenge and complaint. In respect of the Complainant's claim, the Complainant first informed the Provider of damage to his property in **November 2016** and a letter declining his claim and cancelling policy was sent to the Complainant dated **13 April 2017**.

By email dated **19 April 2017**, the Complainant's Broker wrote to the Provider requesting that the "... *underwriters reconsider their position in relation to policy cover and handling of the insureds water damage claim*" A further inspection was carried out on the property on **9 May 2017** by the engineer who conducted the original inspection. By email dated **22 September 2017** the Provider wrote to the Broker informing it that the Underwriters had reviewed the claim and "... *remain of the view that the policy should be voided ab initio on the grounds of non-disclosure.*" The Complainant made a formal complaint by email dated **22 December 2017** which was acknowledged by email the same day, informing the Complainant that the Provider's office would not be in a position to reply to his complaint until **2 January 2018**. A Final Response letter was sent to the Complainant dated **4 January 2018**.

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It is also of note that significant documentation has been submitted in evidence to this office respect of this complaint. A substantial amount of this documentation involves discussions between the Complainant, Broker, Coverholder and Underwriter surrounding the Complainant's claim subsequent challenge and complaint. Taking these matters in consideration, I do not accept that there was an unreasonable delay in dealing with the Complainant's claim, subsequent challenge and complaint.

For the reasons set out 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**

30 June 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.

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