An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0250
Sector:	Insurance
Product / Service:	Household Buildings
Conduct(s) complained of:	Rejection of claim – partial rejection
Outcome:	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns an insurance policy provided by a housing developer to the Complainants who had purchased a house from the developer. The Insurance provides cover against structural defects in the property. In 2014 defects came to light in the Complainants' property. A claim was made. There was a question as to whether aspects of the claim were recoverable under the policy. The Provider gave cover in respect of the pyrite damage that was caused to the property, but did not accept that the damage caused by the water tanks in the attic, was covered by the policy.

The complaint is that the Provider did not correctly or reasonably deal with the Complainants' claim in respect of the damage to their house.

The Complainants' Case

The Complainants set out their complaint as follows:

> *"When I contacted [the Provider] about the attic problem they told me to hold off on dealing with the attic until we had figured out the pyrite problem, as it was the expensive and most invasive of the issues. They said it would be better to complete all the work at the same time when I am out of the house, rather than*

having to move twice or have builders in while I was there. We went through years of stress until our pyrite claim was finally processed and we moved out to have the pyrite remediation work done.

However, they did not do the work while we were moved out and we are now moved back in 2 months and still no sign of the problem in the attic being fixed.

[Consultant Engineer] has written several reports and has demonstrated that the truss in the attic is deflecting causing major damage to the structure of the housing unit. Each e-mail takes a week to respond to. I either get a response on Monday or Friday with a week in between with no communication. Dragging out each week with no help and keeping me so stressed I lose sleep".

I just need this problem solved. As far as I'm aware all that is necessary is for the water tanks in the attic to be emptied and lifted and correct supports put in place. Followed by the repair of the damage to the floor beneath – doors don't close, tiles are lifted, walls are cracked etc. In the meantime my daughter cannot close her bedroom door for the past three months and we are still faced with having builders back in our home again".

The Complainants wish to have their claim for structural damage, connected with the water tank in the attic, accepted and for repairs to be completed by the Provider.

The Complainants have set out in their complaint that they have found the entire process stressful. The Complainants refer to issues they encountered with remediation works, as well as the length of time the process has taken.

The Provider's Case

The Provider's records indicate that two claims (pyrite damage and water tank issues) were notified by the claimant in 2014. With regard to the damage as a result of pyritic heave the Provider states that this claim has been dealt with by its office and the Complainants' property has been remediated of pyrite damage. These works took place in 2016 and 2017. The Provider states that while the Complainants did raise issues with the works completed in April 2017, this matter was addressed in its complaint response letter of 5 May 2017 and the builders revisited to remedy this matter. The Provider submits that, therefore, it considers this matter resolved.

The Provider states that a second claim was notified for damage as a result of insufficiently supported water tanks in the attic. The Provider states that during its investigations, it was deemed prudent and agreed by all parties that the best way to proceed was to deal with the significantly larger and more serious of the claims, the pyrite claim, and to then assess the attic claim as part of the pyrite works. The Provider

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submits that from the outset of any pyrite remediation project, claimants are advised that its Engineers will assess any upstairs damage during the course of the remediation works.

The Provider explains the reasoning for this is that it is easier to identify upstairs damage, resultant of pyritic heave, as opposed to normal settlement or shrinkage cracking, once the structure of the house has been cleared of all finishes and areas of heave detected.

The Provider states that in this case the Complainants were advised that the specific damage upstairs appeared to be as a result of a separate cause, that is, insufficient support of water tanks. The Provider notes that this was confirmed by the Complainants' own Engineer and formed a second claim. The Provider states that on 25 February 2016 during the course of a site visit, the loss adjuster did indicate to the Complainants that it was unlikely the issue with the water tank in the attic was as a result of a cause that would fall for consideration under the policy. The Provider states that this is clearly confirmed in a detailed file note on the claim file. The Provider asserts that at this stage, the Complainants' engineer did not provide his report, which it understands the Complainants' engineer believed evidenced the cause of damage as being attributable to an insured cause.

The Provider submits that its Engineer did advise at this time that if the Complainants' engineer wished to submit his own views, the Provider's Engineer would be happy to consider them.

The Provider's position is that multiple attempts were made to clarify why cover is not available for the attic issue. The Provider states however, that the Complainants and their Engineer continually rejected its position.

The Provider states that the position with regard to this second claim was further outlined in a complaint response letter issued to the Complainants on 29 March 2017.

The Provider suggests that the Complainants have misinterpreted their entitlement to cover under the policy, despite multiple attempts by the Provider's Engineer to clarify the position to both the Complainants and their appointed Engineer.

The Provider's position is that in order for the claim to be considered, major damage to the housing unit caused by a defect in the structure is required in order for cover under the policy, to operate. The Provider's position is that the damage the Complainants are seeking to have remedied under the policy was not caused by a defect in the structure

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The Provider states that the timber spreader is not a load-bearing part of the roof and it is not aware of any defect in the design, construction, material or components of the actual trusses themselves causing the physical damage reported, albeit, it accepts the trusses are a load-bearing part of the roof.

Evidence

File Notes

10 February 2016 – Loss Adjuster re pyrite damage

> *"Please be advised we have received advice from [Geologist] / [Provider Engineer] that there is evidence of pyritic expansion in the infill causing major damage to the structure of these Housing Units. We have received signed claim forms, copy of the Certificate of Insurance and Policy Document. On the basis of this can you please confirm it is in order to accept liability in this matter"?*

16 February 2016 – Provider accepts liability

25 February 2016 – Provider File Note

> *"The claimant also had a structural claim notified for problems with the roof trusses but her engineer was reluctant to provide a part of the report which was supposed to evidence the cause of damage. It appears the two water tanks in the attic are not sitting on adequate brackets. Advised the claimant that in my opinion this cause would not fall for consideration under the policy but if she wanted to get an engineer to present his own views we would be happy to consider same".*

27 April 2017 – Provider's File Notes

> *"I explained that the proximate cause was the inadequate bracket supporting the water tank or the incorrect location of same. She believed that the proximate cause was irrelevant as long as the structure was damaged.*

Correspondence

28 May 2014 – Complainants' Specialist's Report on the Trusses

> *"We have conducted a preliminary analysis of the roof trusses as constructed to support, roof / ceiling and water tanks. ..*
>
> *We have consulted the recommended support system for water tanks in IS 193 and the works clearly do not comply with the recommendations. …*

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We are of the opinion that the damage observed is a direct result of the structural inadequacies of the in situ trusses.

Recommendation

The current support method should be replaced with a suitable system and needs to be installed as a matter of urgency".

9 July 2014 – Provider's Engineer

"I have discussed this matter generally with ... and he has suggested that he would have concerns also with some roof spread arising from this deflection. On the face of it there appears to be a structural problem here with the trusses and you might wish us to inspect and investigate".

27 September 2016 – Complainants' correspondence

"Significant damage was first apparent in the third floor guest bedroom where significant cracking and lifting tiles first started to appear. Stud popping appears on the third floor landing and also on the third floor in both bedrooms. Clearly a knock on from the heave as has happened on the ground floor two floors below".

27 September 2016 – Loss Adjuster

"Regarding the upstairs scope, this will not be confirmed until the stairs go back in, around 9/10 weeks into the project. At that time [Engineer] will inspect and instruct [Repairers] on any pyrite damage to be rectified. Conversely if any damage is considered non pyrite on the upper floors we would not include it in the scope of works".

2 January 2017 – The Complainants

"Now that the stairs are back in it is time to discuss the redecoration work that needs to be done on the upper floors of our house. There is cracking, nail pops and loose tiles on both upper floors, the worst of the damage done by the pyrite is evidenced in the top floor bedroom where the wall cracked in the en suite behind the tiles. There's also significant cracking on the second floor in the living room and bedrooms and tiles lifted in the family bathroom".

20 January 2017 – Provider's Engineer

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"The cracking to the second floor is most likely related to a roof issue or poor workmanship at the time of construction".

20 January 2017 – Provider's Loss Adjuster - Re cracking on second floor:

"As it is not pyrite related, no repairs will be included in the works at this time. However, if it is found to be a defect that falls under the scope of the policy we can consider it under a separate heading and organise to remediate it also, without the need for any further investigations by your own engineer".

30 January 2017 – The Provider's Engineer:

"The damage in the top floor is spread across the rooms. Whilst some cracks above doors are located approx. below the water tanks, there are other areas of cracking remote from the water tanks in other top floor rooms. Therefore, it is only surmised by association that issues with the water tank support are the cause of the cracks located directly below but this can't explain all the other cracking. As discussed these are typical of issues seen elsewhere in [locality] where non-loadbearing partitions in the upper floor rooms are not fitted tight to the underside of the roof structure. Instead the wall plasterboard is stopped short and the ceiling plasterboard is continuous across the head of the partition. The top of the partition is finished with a simple 'taped joint' to the ceiling and this joint is showing signs of failure. … The insured also identified issues with the water tank support that are not in accordance with design recommendations in IS193. These relate to the timber bearers / spreaders and how these are positioned on the trusses. However, it cannot be guaranteed that cracking in the top floor rooms will not reoccur, especially those remote from the location of the tanks".

2 February 2017 – The Provider's Engineer:

"So from the below it can be taken that there may be 2 separate issues causing the cracking upstairs, the water tank and the non-load bearing partition construction.

In relation to the latter, as you know we have offered to cover up this problem with coving previously, on a without prejudice basis. But I understand from recent conversations that this will not help in this case as a) the cracks extend down to door head and b) some are at junctions with a sloping roof.

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I have advice from our claims team that the issue with the water tank is not covered. Therefore in your opinion are we in a position to offer any kind of without prejudice, gesture of goodwill repairs in relation to the other issue? Or do the 2 over-lapping?"

3 February 2017 – The First Complainant:

"I'm feeling ill at all of these conversations and am advised to hand it all over to someone that might be able to handle it all better than I ..."

6 February 2017 – Consultant Engineer:

"It is our opinion that the cause of the cracking in the walls is because of inadequate support of the water tank.

The policy under the Definitions' Section defines Major Damage' (in Clause L) as follows:

"a) Destruction or physicals damage to any portion of the Housing Unit for which a Certificate of Approval has been received by the Underwriter.

b) A condition requiring immediate remedial action to prevent actual destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Approval has been received by the Underwriter.

In either case caused by a defect in the design, workmanship, materials or components of the Structure which is first discovered during the Structural Insurance Period".

It is our opinion that both defects described above come within the terms of this policy and therefore, should be addressed as part of the remedial works".

25 February 2017 – Provider File Note:

"The claimant also had a structural claim notified for problems with the roof trusses but her engineer was reluctant to provide a part of the report which was supposed to evidence the cause of damage. It appears the two water tanks in the attic are not sitting on adequate brackets. Advised the claimant that in my opinion this cause would not fall for consideration under the policy but if she wanted to get an engineer to present his own views we would be happy to consider same".

13 March 2017 – the Consultant Engineer:

"Major Damage, as defined under the policy, requires

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- *'physical damage to any portion of the Housing Unit' – four instances of damage meeting this requirement are set out above;*

- *And/or a condition to exist which requires "immediate remedial action to prevent actual destruction of or physical damage to any portion of the Housing Unit" – such immediate remedial action is certainly required in order to prevent further damage occurring due to the insufficient support of the water tanks and roof structure movement;*

- *In either of the above cases the policy requires that the cause must be attributable to a "defect in the design, workmanship, materials or components of the Structure – the inadequacy of the structural supports to the watertanks and movement within the roof structure are clear defects in the design, workmanship, materials and components of the structure.*

Accordingly, I confirm that Major Damage, as defined under the terms of the …policy, is present in this house. It is noteworthy that the Insurers' Consulting Engineers ... also accept that the damage listed above has occurred as a result of structural inadequacies in this house.

Therefore, I also confirm that it is my opinion that the supports to the water tanks should be upgraded, the adequacy of the strapping of the roof be checked and the damage listed above should then be repaired under the provisions of the... policy"

15 March 2017 – Provider's Loss Adjuster:

"[T]he policy requires that the cause must be attributable to 'a defect in the design, workmanship, materials or components of the Structure"

However we note there is no reference to the policy definition of Structure in [Consultant Engineer's letter]. This definition in the policy is key in our opinion on the matter … he needs to identify where under the ... policy definition of Structure, he feels 'supports to the water tanks' falls for consideration".

21 March 2017 – Consultant Engineer:

"The water tanks are directly supported by timber spreaders which in turn bear onto the bottom chords of the roof trusses. The bottom chords of the roof trusses are inadequate to support the loading from the water tanks which is being transferred to them. This has resulted in the downward deflection of the bottom chords of the trusses and this has caused the damage below. The roof trusses are clearly a fundamental load-bearing part of the roof structure.

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The ... policy definition of Structure clearly includes the roof trusses which are essential load bearing parts of the roof structure. The inadequacy of the bottom chords of these roof trusses fulfils the requirement of the policy that the damage has been caused by a defect in the design, workmanship, materials or components of the Structure".

27 March 2017 – Provider's Loss Adjuster:

"We would be of the opinion that the proximate cause of the damage reported is a defect in the timber spreader supporting the water tank, which is not a load bearing part of the roof, rather than the roof trusses, which are and which would seem entirely fit for purpose".

"In this regard we understand from discussions with our Engineers that the correct design would have been to transfer the load of the tanks onto the external walls of the building and not to simply place them on supports, directly onto the roof trusses. As a consequence it would appear to us that the physical damage reported is attributable to the incorrect placing of these elements ..."

27 March 2017 – The Complainant to the Provider:

"There is evidently structural damage, this is what the insurance policy is for. When we were communicating regarding the issue of pyrite, you informed me that the insurance policy is not to cover pyrite but rather the damage caused by the pyrite. In this instance you are taking another track and referring to the causation of the structural damage rather than the damage itself".

10 April 2017 – Loss Adjuster:

"Water tank installation requires that the loading from the spreaders is imposed on the roof truss at the node points. In this case the tank is not correctly positioned resulting in the load from the spreaders being imposed on the bottom chord of the truss away from the node points. In this regard [Consultant Engineer] is correct in saying that the chords are deflecting excessively as they are generally not designed to accommodate this unintentional loading. However, [Consultant Engineer] has provided no commentary or calculations to show that if the tank was positioned correctly the chords would be OK. Therefore he has not demonstrated that the truss is under designed based on the intended loading – only that the truss is deflecting due to the unintended loading. The question now is whether the ... policy is triggered by a badly installed water tank, even if this does cause primary structure to deflect extensively".

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11 April 2017 – Consultant Engineer:

> *"As I previously advised the … policy which applies to this house under the Definitions' Section defines "Major Damage" (in Clause 1) as follows:*
>
> *"a) Destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Approval has been received by the Underwriter.*
>
> *b) A condition requiring immediate remedial action to prevent actual destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Approval has been received by the Underwriters.*
>
> *In either case caused by a defect in the design, workmanship, materials or components of the Structure which is first discovered during the Structural Insurance Period".*
>
> *The recent [Provider] emails indicate that they have now accepted that physical damage to a portion of this house has occurred and that immediate remedial action is required to prevent further physical damage being caused.*
>
> *The [Provider's Engineer's] extract contained in ... e-mail dated 10th inst. Constitutes an acceptance that the physical damage i.e. the cracking present at the upper floor levels, is the result of a* ***defect in workmanship*** *by virtue of the water tanks being "not correctly positioned resulting in the load from the spreaders being imposed on the bottom chord of the truss" and that this has resulted in the fact that "the chords are defecting excessively". This is the cause of the damage referred to above.*
>
> *It is clear from the above that the relevant requirements under the … policy in respect of "Major Damage" as defined in that policy have been met. Furthermore, the recent [Provider / Provider's engineer] correspondence confirms this fact.*
>
> *Accordingly, [the Provider] should now proceed to honour the obligations under the policy and instruct that the required remedial work be carried out. The actual nature of this remedial work is a matter for [the Provider] with the advice of their technical advisers [Provider's engineer]. There is no role in this matter for [Consultant Engineer] either in providing calculations or in demonstrating that the truss is under designed".*

12 April 2017 – Provider to the Complainant:

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"If [Complainant's engineer] would like to provide evidence that he considers will show that a defect has occurred in the Structure that has caused the physical damage you have reported we will be happy to look at this on your behalf".

18 April 2017 – Provider's Loss Adjuster to the Complainant:

"We are satisfied that we have made our positon clear on this matter at this stage, and it is noted … has omitted the specific reason we do not consider cover to be available under the ... Policy, Section 3.3. despite previous advice.

For Major Damage (which we accept has occurred) to be considered, there must be a defect in the Structure, as defined in the policy. In his latest correspondence and to date this has not been evidenced. To clarify, we do not believe the defect to be in the structure of the roof, but to be in the inadequate design of the supports for the water tank.

If Mr. … would like to provide evidence that he considers will show that a defect has occurred in the Structure that has caused the physical damage you have reported we will be happy to look at this on your behalf. If not, we confirm our Final Response has issued".

18 April 2017 – The Complainant to the Provider:

"The [Provider] has agreed there is major structural damage. I cannot see where in the insurance policy I have before me that requires further evidence beyond your acceptance that there is a major structural damage and that the cause has been identified. Our engineers have stated very clearly that damage has been inflicted on the trusses causing the damage to the structure."

21 April 2017 – The Provider to the Complainant:

"Thank you for your latest email. The issue causing confusion and what the Engineers are missing, is that despite the obvious damage, the cause (or Defect) has been identified, and is agreed as inadequate supports to the water tanks, as per letter of the 21/03/17. However they (the inadequate supports, the Defect) do not fall under the policy definition of structure.

- *Foundations*
- *Load-bearing parts of floors, staircases and associated guardrails, walls and roofs, together with load bearing retaining walls necessary for stability.*
- *Roof covering*
- *Any external finishing surface (including rendering) necessary for the watertightness of the external envelope.*

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- *Floor decking and screeds, where these fail to support normal loads*

As previously advised, Underwriters retained Engineers have reviewed your Engineers advice and have advised the following:

"Water tank installation requires that the loading from the spreaders is imposed on the roof truss at the node points. In this case the tank is not correctly positioned resulting in the load from the spreaders being imposed on the bottom chord of the truss away from the node points.

In this regard [Consultant Engineer] is correct in saying that the chords are deflecting excessively as they are generally not designed to accommodate this unintentional loading. However, [Consultant Engineer] has provided no commentary or calculations to show that the truss is under designed based on the intended loading – only that the truss is deflecting due to the unintended loading".

So, the defect is not in the structure; but for the unintended loading of the trusses, there would be no defect, and no damage".

27 April 2017 – Complainant to the Provider:

"I need a specific final response with regard to the dispute over the attic works".

27 April 2017 – The Provider to the Complainant:

"Although we agree that damage has been caused to the truss of your property, which has in turn led to cracking to the upper portion of your property, we confirm that the damage to your truss is unfortunately consequential damage caused by the defect in the installation of the water tank. Therefore, the proximate cause of the damage you are reporting (being the first part of an unbroken train of events giving rise to the loss you have reported) is the defectively installed water tank, which is not an insured peril under the ... policy, rather than any defect in the actual truss itself, which is".

27 April 2017 – Provider to the Complainant:

"Our Final Response in relation to the physical damage you have reported to your property caused by the defective installation of the water tank, is unfortunately the water tank is not an insured item under the ... policy definition of Structure.

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For ease of reference indemnity is available to a Policyholder for any Physical loss, destruction or damage caused to their Housing Unit by the following elements which comprise the Structure as defined on Page 5 of your policy."

27 April 2017 – The Complainant to the Provider:

"The damage to the truss (deflection) was caused during the original building work by poor workmanship (the incorrect support of the tanks) of the builder (not, to use your colleagues example, by me taking a hammer to the truss) this too is agreed".

28 April 2017 – The Complainant to the Provider:

"I have told you time and again I am perfectly capable of reading the policy as well as you can. I made it clear in my email last week that our difference of opinion was now a matter for the ombudsman to clear up. I find your repeated emails harassing and the phone call from … yesterday bordering on bullying. There was no need for the phone call, and we have both agreed in the past to keep all communication to email. I told you previously I did not want to deal with… having found his behaviour unprofessional".

The Complainant then sets out a number of instances which caused concern.

1 May 2017 – the Complainant to the Provider:

"No ... it does not clarify the issue because; damage has been caused to the structure of the housing unit and this is not in question. Therefore the damage needs to be repaired. This appears so transparent to me and to anyone I discuss it with".

The Complaint for Adjudication

The complaint is that the Provider did not correctly or reasonably deal with the Complainants' claim in respect to the damage to their house.

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 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 **23 March 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.

The Complainants acknowledged receipt of the Preliminary Decision on **23 March 2020**.

The Provider made an extensive post Preliminary Decision submission under cover of its legal representatives' letter to this Office dated **15 April 2020**, a copy of which was exchanged with the Complainants who advised this Office under cover of their e-mail dated **15 April 2020** that they were disappointed with the Provider's further submission and commented that they did not see anything new in the submissions from the Provider.

Following the Provider's review of the Complainants' response of **15 April 2020**, the Provider made a submission dated **17 April 2020** stating that unless the Complainants were in a position to provide additional technical information, confirming that the proximate cause of the damage complained of has arisen from a defect in the design, workmanship, materials or components of the load-bearing trusses themselves, the Provider has no further comment to make. This submission was exchanged with the Complainants and they advised on **06 May 2020** that they had nothing further to add.

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

Having examined the submissions and evidence furnished by the parties and considering what is fair and reasonable in the particular circumstances of this complaint I have set out my Decision below.

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The Complainants' insurance cover relating to the matters under dispute in this complaint, is contained in a policy provided by a housing developer to the Complainants who had purchased a house from that developer. The developer paid the premium for the Policy.

The Insurance provides cover against defects in the property. The property developer had to first give the Provider certification of the compliance with Building Regulations in relation to the construction of the house, before being provided with the insurance cover.

I note that under the policy the Provider has subrogation rights to enable it pursue recovery from others where it is found that another person has liability in respect of a claim that the Provider has accepted.

In 2014 defects came to light in the Complainants' property. A claim was made by the Complainants. The Provider questioned whether aspects of the claim were recoverable under the policy. The Provider accepted the claim in respect of the pyrite damage that was caused to the property, but did not accept that the damage caused to the upper floors by issues relating to the construction/location of water tanks in the roof space, was something covered by the policy.

The Policy Provisions state as follows:

"Major Damage

a) *Destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Approval has been received by the Underwriter*
b) *A condition requiring immediate remedial action to prevent actual destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Approval has been received by the Underwriter*

In either case caused by a defect in the design, workmanship, materials or components of the Structure which is first discovered during the Structural Insurance Period.

For the purpose of this Policy the definition of Major Damage is deemed to include any physical loss destruction or damage caused by contamination or pollution as a direct consequence of a defect in the design, workmanship, materials or components of the Structure of the Housing Unit".

R. Structure

The following elements shall comprise the Structure of a Housing Unit:

- *Foundations;*
- *Load-bearing parts of floors, staircases and associated guard rails, walls and roofs, together with load-bearing retaining walls necessary for stability;*
- *Roof covering*
- *Any external finishing surface (including rendering) necessary for the water-tightness of the external envelope;*
- *Floor decking and screeds, where these fail to support normal loads.*

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I note that there is no specific definition in the policy document of what constitutes a 'defect'. In general "defect" can mean a want or **absence** of something necessary for completeness.

The Provider has stated that: *"in the case of the pyrite claim, physical damage to the Housing Unit was caused by a defect in the load bearing part of the floor and as a consequence fell for consideration under the ... policy definition of Structure".*

In this instance I note that the 'defect' was something that was present in a load bearing part of the Structure, that is, the presence of pyrite.

I stated in my Preliminary Decision:

> *"In the case of the roof trusses or walls (both load bearing parts of the Structure) I consider that it is the absence of something that constitutes a 'defect', that is the brackets or supports that should have been attached to the trusses or the wall to support the water tanks, and therefore I consider that this is a 'defect' in the Structure that entitles the Complainant to the benefit of the policy."*

The Provider, in its post Preliminary Decision submission, argues that my Preliminary Decision is based on a finding that the absence of modifications, or attachments, to the trusses constitutes a defect. The Provider states that this finding of fact is not supported by any technical evidence before me. The Provider states that as long as the bearers are retained in their current position, they will cause damage **to** the Structure (deflection of the truss chords) and Housing Unit (cracking the walls and ceilings beneath the water tanks).

The Provider states that, even were my finding to be supported by any technical facts, it is irrational to conclude that the absence of something which is by definition external and extraneous to the actual trusses could constitute a defect **in** the trusses themselves. The Provider states that by this logic, for example, the absence of proper foundational support due to the presence of pyrite in the infill would also constitute a defect in the trusses, if the trusses were not able to hold up the roof on their own when the foundations gave way. The Provider states that the (obvious) fact that the trusses could not do everything which was asked of them by the builder, namely to support an unintended loading resulting from incorrect positioning of bearers/spreader beams, is not a reason for me to conclude that the trusses were in any way defective and unable to do that which they were properly designed and constructed to do.

The Provider suggests in its post Preliminary Decision submission that the primary direction which I propose to make is that the water tank in the Housing Unit be repositioned. This is an incorrect interpretation of what I set out in my Preliminary Decision. I will return to this later.

The Provider submits that the reasoning underlying this direction results from my acceptance that it was reasonable for the Complainants to argue that there was a defect in the structure because of the absence of supports for the water tanks.

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The Provider states that I make this finding purportedly in reliance on the *"clear guidelines in place for the installation of water tanks on roofs, in particular in relation to the placement of supports for the tanks"*, which it states is presumably a reference to IS-193, although, it points out that this is not explicit in the Preliminary Decision. It goes on to state regarding water tanks in the roof space created by the roof truss frame, IS-193 concerns, in material part, the correct positioning of the supports for water tanks.

The Provider, in its post Preliminary Decision submission states that it appears from my Preliminary Decision that I am confused as to whether it is the positioning of the water tank which gives rise to the defect … or the absence of supports for the water tank. In any event, it asserts that neither of these defects constitutes a defect in the Structure as defined within the Policy.

It is the Provider's position that the presence or absence of water tank supports has nothing to do with the Structure (as defined) of the Housing Unit (as defined), other than the (coincidental) fact that such works would be applied to an element of the Structure (as defined), that is to the chords.

The Provider states that such works that may be applied to a structure do not convert them into a load bearing element of the structure, any more than a partition wall converts to a load bearing part of the structure once it has been attached to a load-bearing wall. The Provider states that a defect in such supports might cause damage **to** the Housing Unit which, as defined, includes the Structure, but that this still does not bring them within the actual definition of Structure under the Policy itself.

It is the Provider's position that similarly, the positioning of water tanks cannot form part of a structure, either as a matter of common sense or having regard to the definition of Structure under the Policy.

The Provider comments on the fact that, in my Preliminary Decision, I acknowledge that in and of themselves, the *"roof trusses may not have been defective"*, but that I determined that the purported defect in the roof trusses is the absence of modifications/ additions *"in"* the roof trusses.

The Provider, in its post Preliminary Decision submission, again states that Major Damage is defined as damage caused by a defect **in** the design, workmanship, materials or components **of** the Structure (as defined). It is not expressed to include damage caused by a defect in the design, workmanship, materials or components:

(i) of attachments to the Structure, or

(ii) of other elements in the building exerting force on the Structure,

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(iii) of non-structural connections through which force is transmitted from other elements in the building to the Structure.

The Provider submits that I may possibly have been confused by the use of the word "modification". The Provider states that it is accepted that if a structural element is modified such that something is taken away and it is weakened in some way, that modification **to** the structure will give rise to a defect **in** the Structure as defined. The Provider draws attention to the fact that I refer to something being added, that is brackets and supports, which, it suggests would not change the intrinsic nature of the structural element but would merely constitute an appendage to it. (The Provider states "this is of course also a modification of sorts".)

The Provider states that in the absence of any technical evidence to the contrary, the trusses were *"complete"* when originally constructed and did not suffer from any *"want"* or *"absence"*; they are therefore not defective even if my definition of the term *"defect"* is accepted by the Provider, which the Provider states that it is not.

The Provider states that the fact that the trusses were not themselves defective is acknowledged by me, but suggests that in attempting to avoid the necessary implications of that fact, I have made a serious error in treating non-structural items sitting on top of the trusses as forming part of the Structure as defined and insured under the Policy.

The Provider states that by this logic, for example, a heavy box of Christmas decorations or other household items sitting on top of the trusses are also load-bearing parts of the property.

The Provider's statement is not an accurate reflection of what I set out in my Preliminary Decision. I did not express the view that non-structural items sitting on top of the trusses formed part of the Structure as defined and insured under the Policy. I hold that if the roofing structure is intended to hold water tanks it should be designed and constructed to be fit for that purpose and certainly not in a way that has led to acknowledged damage to the trusses and onward damage in the form of cracking to the upper area of the property. The evidence submitted by the parties demonstrates that due to a defect in the design, workmanship, materials or components, the roof structure is not in fact fit for this purpose and damage to the Complainants' home has resulted.

I find the arguments and interpretations advanced by the Provider here to be counter-intuitive. I can see no logic or relevance in the Provider seeking to compare design, workmanship, materials or components input, or omitted, by the builder during construction of the house, that have indisputably caused significant damage to the property, to a heavy box of Christmas decorations that might be placed there by the occupant. This is not a real comparison. In this respect I think it is important to remind the Provider that the installation of the trusses and the water tank was carried out under the purported workmanship of the builder and not the Complainants. Engaging in this type of comparison is not only entirely unhelpful, but serves to demean the very difficult situation that the Complainants now find themselves in with respect to the structural damage to their property.

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The Provider accepts (in letter dated 30 May 2018) that the roof trusses themselves are a load bearing part of the roof, but state that it is ***"not aware of any defect in the design, construction, material or components of the actual trusses themselves, causing the physical damage reported"***.

It is of particular note here that in the above explanation the Provider omits to state that it is not aware of any issue with the ***workmanship*** involved. An element specifically included in the particular section of the policy and the element that has contributed to the damage to the Complainant's home in this present complaint.

The Provider, in its post Preliminary Decision submission, states that my proposed findings are symptomatic of a failure to distinguish between damage caused **to** the Structure on the one hand and a defect **within** the Structure (as defined) on the other. The Provider states that if the Structure (as defined) suffered damage because of the defective positioning of the water tank supports (the bearers), then it is consequential damage to the Housing Unit caused by the defective positioning/installation works. The Provider states that the Structure (as defined) does not have to be defective to suffer damage, and suggests that there is no technical evidence before me that any element within the Structure (as defined) in this case was defective or caused the physical, loss destruction or damage to the Housing Unit complained of.

The Provider states that instead, the technical evidence, the reasoning and the proposed directions set out in the Preliminary Decision all point unavoidably to the conclusion that the Structure (as defined) has been damaged (that is deflection of the truss chords) not by any defect **in** the Structure itself (as defined), but by the builder's failure to properly position/install the water tank supports, which caused consequential damage to the Housing Unit (i.e. plaster cracking in walls/ceilings located under the water tanks).

The specialist relied upon by the Complainants, identified issues with the water tank support that he states are not in accordance with design recommendation IS193. The Provider itself has accepted that there was insufficient support of the water tanks.

In the Provider's Engineer correspondence of 9 July 2014 it is stated that:

> *"On the face of it there appears to be a structural problem here with the trusses and you might wish us to inspect and investigate".*

In the Provider's File Note of 25 February 2016 it is stated that:

> *"It appears the two water tanks in the attic are not sitting on adequate brackets".*

In the Provider's Loss Adjuster correspondence of 27 March 2017 it is stated that:

> *"[W]e understand from discussions with our Engineers that the correct design would have been to transfer the load of the tanks onto the external walls of the*

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building and not to simply place them on supports, directly onto the roof trusses. As a consequence it would appear to us that the physical damage reported is attributable to the incorrect placing of these elements ..."

I consider that it was reasonable of the Complainants to argue that there was a defect in the design, workmanship, materials or components of the structure, in that the defect in design, workmanship and components of the structure meant that the appropriate supports were not in place for the weight of the water tanks. I consider that the defect in the workmanship, design and components which led to the absence of supports (be they brackets or otherwise) of the structure (on the walls or trusses), is a defect that any reasonable person would expect to come within the scope of the policy for cover. There are clear guidelines in place for the installation of water tanks in roofs, in particular, in relation to the placement of supports for the tanks.

It may be that the roof trusses themselves would not have been defective, that is, if no water tanks were to be placed in the roof space, but where the water tanks were to be installed in the roof space, the trusses required modifications/additions incorporated to accommodate the weight of the water tanks. I consider that it is the absence of these modifications that constitute the defect in the Structure.

It is the Provider's position that the presence or absence of water tank supports has nothing to do with the Structure (as defined) of the Housing Unit (as defined), other than the (coincidental) fact that such works would be applied to an element of the Structure (as defined), i.e. to the chords.

While the Provider states that it is a "coincidental fact" that water tank supports would be applied to an element of the Structure, I would consider that it would be more than a "coincidental" fact, but a given fact, that the roof area or walls (i.e. the Structure) would be supporting/accommodating the water tanks.

I believe any reasonable interpretation would consider that the Structure would have to be fit for purpose in all respects, including the ability to accommodate and support the water tanks.

The Provider states that a defect in such supports might cause damage **to** the Housing Unit which, as defined, includes the Structure, but argues that this does not bring them within the actual definition of Structure under the Policy itself.

It is also the Provider's position that similarly, the positioning of water tanks cannot form part of a structure, either as a matter of common sense or having regard to the definition of Structure under the Policy. I disagree, I believe common sense would suggest otherwise.

The Provider is correct that the policy definition of the Structure does not go as far as mentioning the inclusion of adequate supports for water tanks, as being an integral part of the Structure. However, I consider that just because something is not specifically stated in

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a policy such as this, does not mean it is excluded. It is not reasonable to suggest that adequate supports absent from the Structure are not covered simply because they are not specifically mentioned in the policy. I consider that for a proper, complete and functioning roofing structure, it is reasonable to expect that it would be able to support the water tanks, in a manner that did not cause damage of the nature that was caused to the Complainants' home.

The Provider states that Major Damage is defined as damage caused by a defect **in** the design, workmanship, materials or components **of** the Structure (as defined). It is not expressed to include damage caused by a defect in the design, workmanship, materials or components:-

(i) of attachments to the Structure, or

(ii) of other elements in the building exerting force on the Structure,

(iii) of non-structural connections through which force is transmitted from other elements in the building to the Structure.

I accept the Provider's position in this regard, but it was the absence of the components resulting from defects in the design and workmanship that caused the damage to the Complainants' home.

The Provider states that the reality is that in the absence of any technical evidence to the contrary, the trusses were *"complete"* when originally constructed and did not suffer from any *"want"* or *"absence"*; they are therefore not defective even if my definition of the term *"defect"* is accepted. However, the Provider states it does not accept this definition of defect.

The Provider has sought to make sophisticated contractual arguments and interpretations in seeking not to admit the Complainants' claim. In particular, I find the Provider's attempts to differentiate between damage caused by the structure from damage to the structure to be a rather technical, or at least counter-intuitive interpretation. I do not believe that such an approach is appropriate in dealing with consumer insurance contracts such as applies in this complaint. The fact that the application of the policy has had to be the subject of expert engineering analysis further indicates the complexity of the contractual provision that we are dealing with and that the resolution involves consideration of fact and law in a sensible and reasonable manner.

I do not accept the Provider's position. I am of the view, based on the submissions and evidence before me, that any fair and reasonable consideration of this matter would conclude that damage has resulted as a consequence of a defect in the design, workmanship, materials or components of the Structure of the Housing Unit as provided for in the policy.

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Referring to remedy I proposed in my Preliminary Decision, the Provider submits that incoherence of reasoning in my Preliminary Decision is evident from the proposed direction that *"the Provider correctly position the water tanks"*. The Provider states that "No direction is proposed by the FSPO that any defect in the trusses be remediated, because there is no defect in the trusses". The Provider considers that the proposed direction demonstrates what it states is "*already obvious"*, that is, that the defect lies in the installation/positioning the water tank supports, which supports are not structural elements either within the meaning of Structure as defined under the Policy or otherwise.

The Provider states that by directing that the water tanks be correctly positioned, also demonstrates that not only is it not the absence of supports/brackets which is the source of the problem, but also contradicts the factual basis on which the Preliminary Decision is purportedly made. The Provider considers that there is no basis on which the positioning of water tanks comes within the definition of Structure as defined under the Policy or otherwise.

In making these assertions the Provider is selectively quoting from my Preliminary Decision when referring to my proposed direction.

What I actually indicated in my Preliminary Decision was that I intend to direct:

> *"…that the Provider correctly position the water tanks and repair the damage that resulted as a consequence of a defect in the design, workmanship, materials or components of the Structure of the Housing Unit" and:*
>
> *"…that the Respondent Provider remedy the issues in relation to the water tanks…"*

The correct positioning of the water tanks is only one component of the direction that I indicated I propose to make in order to rectify the defect in the design, workmanship, materials or components of the Structure of the Housing Unit. However, I believed it appropriate, and still do, to specifically mention the repositioning of the water tanks in the interest of clarity and the avoidance of doubt. I believe this is necessary because to rectify the other defects without correcting the issues surrounding the water tanks would be pointless and likely lead to further damage.

In commenting on my proposed direction, the Provider again asserts that there is no basis on which the positioning of water tanks comes within the definition of Structure as defined under the Policy or otherwise.

As I have already pointed out, I do not accept that there is no basis on which the positioning of water tanks comes within the definition of Structure as defined under the Policy or otherwise. The definition of Structure could only mean a Structure that has the ability to accommodate and withstand the weight of water tanks, which is clearly not the case in the Complainants' home. My proposed direction was (and remains) that the

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Provider rectify the defect in the design, workmanship, materials or components of the Structure of the Housing Unit including correctly positioning the water tanks. How the Provider remedies the defect causing the damage may require adjustments to the trusses, but its own experts have referred to other ways to position the tanks, so that they do not cause the damage that the defect is currently causing. This will be a matter for the experts to determine.

The Provider asserts that my proposed findings are symptomatic of a failure to distinguish between damage caused **to** the Structure on the one hand and a defect **within** the Structure (as defined) on the other. The Provider states that if the Structure (as defined) suffered damage because of the defective positioning of the water tank supports (the bearers), then it is consequential damage to the Housing Unit caused by the defective positioning/installation works. The Provider states that the Structure (as defined) does not have to be defective to suffer damage, and there is no technical evidence before me that any element within the Structure (as defined) in this case was defective or caused the physical loss, destruction or damage to the Housing Unit complained of.

The Provider states that instead, the technical evidence, the reasoning and the proposed directions set out in the Preliminary Decision all point unavoidably to the conclusion that the Structure (as defined) has been damaged (i.e. deflection of the truss chords) not by any defect **in** the Structure itself (as defined), but by the builder's failure to properly position/install the water tank supports, which caused consequential damage to the Housing Unit (i.e. plaster cracking in walls / ceilings located under the water tanks).

Again, I do not agree with the Provider's summation above. I believe any reasonable examination of the circumstances of this complaint indicate that the defect was with the Structure, as, it is unable to support the weight of the water tanks, thereby causing damage.

The other elements of this complaint are that that the entire process was stressful and caused inconvenience to the Complainants. The Complainants refer to issues that they encountered with remediation works, as well as the length of time the process has taken. It is clear from the submissions that efforts by the Complainants to have their home put right in all respects was a stressful experience. It is also clear that the Provider's stance in refusing to deal with the damage caused to the upper floors of the house by the water tank problem caused the Complainants stress and inconvenience for some time. I consider that with all such claims where the parties take differing views and where the remedying of the damage is extensive, involving a move out of the house and the presence of differing trades people, is going to be stressful and trying on all the parties. Likewise where there are many decisions to be made as to how the works are to be completed and where the property owners have plans themselves with regard to further improvements or decoration of the property, there is going to be disruption and time delays. I accept that there were instances where there could have been better communication and service from the Provider. However, I also note that the Provider did accommodate the Complainants with many of their requests as to how they wanted things done with the

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property. I cannot find that there was any intent by the Provider in making the remediation process relating to the pyrite damage a stressful one for the Complainants.

That said, it is clear from the submissions that efforts by the Complainants to have their home put right in all respects was overall an extremely stressful experience. It is also clear that the approach adopted by the Provider in refusing to deal with the damage caused to the upper floors of the house has caused the Complainants great inconvenience, stress and effort for some six years in trying to secure a remedy. For this reason I believe compensation is merited.

The Provider, in its post Preliminary Decision submission, seeks to establish that the grounds given in my Preliminary Decision for the proposed direction of a payment of €20,000 are inappropriate. It seeks to do so on the basis of the following quotation from my Preliminary Decision:

> *"… it is clear from the submissions that efforts by the Complainants to have their home put right in all respects was a stressful experience, particularly in relation to the water tank issues.*
>
> *It is also clear that the intransigence of the Provider in refusing to deal with the damage caused to the upper floors of the house has caused the Complainants great inconvenience, stress and effort for some years in trying to vindicate their rights under the policy."* (Emphasis added).

The Provider states that it appears from this passage that in directing the Provider to pay compensation, I have taken into account not only the damage, the subject-matter of the complaint, but also stress and inconvenience which the Complainants are alleged to have suffered as a result of the pyrite damage to their home.

The Provider is not correct in this assertion.

The Provider's position is that it no more caused stress and inconvenience arising from the administration of the Complainants' claim for damage caused by pyritic heave in the Complainant's home than that caused by the defect giving rise to it, that is the use of defective infill materials by [the Developer], and for me to direct the Provider to pay compensation for it is entirely irrational, inequitable and is inconsistent with section 60(4) of the Act.

The Provider states that it is also evident from the quotation above that I propose to direct the Provider to pay compensation for (i) the alleged stress and inconvenience arising from the *"water tank issues"* themselves and *"also"* (ii) for the alleged stress and inconvenience arising from the Provider's *"intransigence in refusing to deal with the damage caused"*.

The Provider states that this is inconsistent with my acknowledgment that *"the Provider did accommodate the Complainants with many of their requests as to how they wanted things done with the property",* and his conclusion that he could not *"find that there was*

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any intent by the Provider in making the remediation process a stressful one for the Complainants."

The Provider further states that any stress and inconvenience which the Complainants allegedly suffered by reason of the *"water tank issues"* alone was not caused by any conduct on the part of the Provider, but was instead caused by the builder responsible for the relevant defects. The Provider states that:

> *"[R]egarding the subject defect (incorrect position of the water tank supports), once notified of the Claim on 9 June 2014, the Provider's agent, [Loss Adjuster], engaged with the Complainants' then appointed engineer, .., to ascertain if the Policy covered the damage. As set out above, on a number of occasions, [the Loss Adjuster] asked [the Complainants' engineer] to provide a copy of the ...Truss Analysis, for the purpose of determining whether there was a structural defect covered by the Policy. It was entirely reasonable for the Provider to infer from [the engineer's] refusal to provide the... Truss Analysis that there was no defect in the trusses.*
>
> *It is unfair and unjust to refer to the Provider's entitlement to rely on the contractual terms of the Policy as "intransigence", particularly in circumstances where they were doing so via [Developer's] engineer, when [Developer] was responsible for the incorrect installation/positioning of the water tank supports and therefore had a vested interest to ensure the Policy responded to the Claim.*
>
> *The only stress and inconvenience which the Provider could, as a matter of logic, be responsible for would relate to the interactions between it and the Complainants. It is noteworthy in this context that the Complainants chose to use the service of engineers ..., appointed by [Developer], the original builder, despite the obvious conflict of interest.*
>
> *[The engineer's] letters demonstrate [the engineer's] obvious attempts to shoehorn the defective installation / positioning of the bearers within the truss framework, into a defect in the workmanship (i.e. construction) of the Structure (as defined). This is the true source of any stress which the Complainants may have suffered arising from their interactions with the Provider.*
>
> *Furthermore, in directing the Provider to pay compensation for its own "intransigence", the FSPO has failed to have any or any proper regard to the numerous attempts on the Provider's part to inform the Complainants of the reasoned basis for its decision. In pointing out that the Policy in this case does not cover the Complainant's claim, the Provider was merely relying on the contract between the parties; the Provider's lawful reliance on the terms of the Policy cannot rationally be characterised as intransigence.*

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For all of the above reasons it is contrary to law, unreasonable, and inequitable, for the FSPO to direct the Provider to compensate the Complainants for stress and inconvenience".

The Provider states that in addition to this, insofar as I have relied on alleged poor conduct on the part of the Provider in directing it to pay compensation for stress and inconvenience, this is in excess of the FSPO jurisdiction, in two respects, namely:

(i) Section 60(4) does not provide that compensation be paid for stress; and

(ii) Section 60(4) clearly provides that any payment should be compensatory for loss, expensive or inconvenience, and not punitive.

The Provider also submits that the reality is that there are no and/or proper grounds set out for the conclusion that the Complainants have suffered inconvenience, or stress if it was relevant, which it is not, to justify the payment of €20,000 in compensation or any amount.

I do not accept these statements by the Provider nor do I accept that they accurately reflect what I set out in my Preliminary Decision. For the avoidance of doubt, the compensatory payment I indicated I would direct and that I now direct is for the very great inconvenience that the Complainants have suffered for over six years, and that is still ongoing in respect of the Provider's failure to deal with the water tank issues since the matter was first raised by the Complainants in 2014 and on an ongoing basis since then. There is no escaping the fact that the Complainants have been put to great inconvenience, stress and effort for all these years in trying to secure a resolution under the policy. The fact that the Provider cannot comprehend the inconvenience that has been caused to the Complainants by this matter shows a very serious lack of understanding of the implications of its conduct. For the avoidance of doubt, I am directing compensation to the Complainants. This is not some sort of punitive direction as suggested by the Provider. I have no jurisdiction in relation to sanctions and am not seeking to "punish" the Provider. Having made my decision in relation to this complaint I am making an appropriate direction that I believe is proportionate and appropriate to remedy the conduct complained of and as is provided for under s60(4) of the ***Financial Services and Pensions Ombudsman Act 2017***.

I note the Provider's point that it was the Developer who was responsible for the incorrect installation/positioning of the water tank supports and the subsequent damage and therefore contributed to the Complainants' stress and inconvenience. I also note the Provider's comments in relation to the developer and its Engineer. However, these are not matters which I can comment or adjudicate on. What is clear is that the Complainants are the party bearing the brunt of the damage to their home. They are the ones suffering the ongoing inconvenience. The purpose of the insurance policy was to remedy this matter and should therefore have provided peace of mind and a solution for the Complainants. This has not proved to be the case.

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There can be no doubt that if the Provider had remedied the damage to the upper floors when undertaking the remedial work to the lower floors, the Complainants could have been saved a great deal of inconvenience.

The Provider states that there are wide-ranging grounds provided for in section 60(2)(b), (c) and (g) of the ***Financial Services and Pensions Ombudsman Act 2017***, for upholding a complaint, some of which have very serious implications for a provider, the subject of an adverse finding. The Provider suggests that in citing those provisions in my Preliminary Decision, I have not identified which of them has been found to apply in this complaint.

In its post Preliminary Decision submission the Provider repeats much of the arguments proffered during the investigation of this complaint and states:

> *"We call upon the FSPO to reconsider the Preliminary Decision which, we assert, is not supported by the factual or technical evidence, is entirely inconsistent with the contractual terms of the Policy of insurance between the parties and contains serious errors of law."*

I do not accept the Provider's assertions in this regard, having considered the matter in detail I am of the view that:

> The Provider's conduct was unreasonable, in that it failed to provide a remedy for the damage that resulted from the defect in the design, construction, material, components and workmanship as provided for in the policy.
>
> That the Provider acted unjustly, when it refused to remediate the damage resulting from the defect in the design, construction, material, components and workmanship as provided for in the policy.
>
> That the Provider's conduct was improper in that it did not remediate the damage caused to the Complainants' property as provided for under the policy.

I would also draw the Provider's attention to the fact that the Oireachtas has conferred a different role on this Office than that conferred on the Courts. This Office does not operate as a Court. ***Section 11 of the Financial Services and Pensions Ombudsman Act 2017*** states:

> *"(11) Subject to this Act, the Ombudsman, when dealing with a particular complaint, shall act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form".*

This is further supported by the views expressed by McMenamin J. in the decision of *Hayes v. Financial Services Ombudsman [2008] 11 MCA.*

In paragraphs 33 and 34 of his [McMenamin J] decision he states:

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> *"33. 'What has been established, therefore, is an informal, expeditious and independent mechanism for the resolution of complaints. The Respondent [the Financial Services Ombudsman] seeks to resolve issues affecting consumers. He is not engaged in resolving a contract law dispute in the manner in which a court would engage with the issue.*
>
> *34. 'The function performed by the respondent [the Financial Services Ombudsman] is, therefore, different to that performed by the courts. He is enjoined not to have regard to technicality or legal form. He resolves disputed using criteria which would not usually be used by the courts, such as whether the conduct complained of was unreasonable simpliciter; or whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with a law, it is unreasonable, or is otherwise improper".*

My decision, in relation to this complaint, is based on the powers as set down in the ***Financial Services and Pensions Ombudsman Act 2017***.

Having regard to all of the above, I substantially uphold the complaint and I direct (i) that the Provider repair the damage that resulted as a *consequence of a defect in the design, workmanship, materials or components of the Structure of the Housing Unit* (including correctly positioning the water tanks) and (ii) that the Provider pay the Complainants the compensatory payment of €20,000 (twenty thousand euro) for the inconvenience caused by the length time taken to have these issues resolved.

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)(b) and (c) and (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 (i) repair the damage that resulted as a consequence of a defect in the design, workmanship, materials or components of the Structure of the Housing Unit (including correctly positioning the water tanks) and (ii) pay compensation to the Complainants in the sum of €20,000 for the inconvenience caused.

The Provider is to make the compensatory payment to the Complainants in the sum of €20,000, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants 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 account, within that period.

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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

24 July 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.