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| <b><u>Decision Ref:</u></b>             | 2020-0354  |
| <b><u>Sector:</u></b>                   | Insurance  |
| <b><u>Product / Service:</u></b>        | Household Buildings  |
| <b><u>Conduct(s) complained of:</u></b> | Rejection of claim – partial rejection<br>Disagreement regarding Settlement amount offered |
| <b><u>Outcome:</u></b>                  | Upheld   |

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

The complaint relates to a home insurance policy.

#### **The Complainant's Case**

The Complainant states that her husband arranged for a company to drill a well next to the insured property. The Complainant states that the drilling was carried out on **31 October 2018**, and on **3 November 2018** it became apparent that the property was subject to subsidence. The Complainant states that she contacted the Provider to report the damage and the Provider subsequently appointed a Loss Adjuster to act on its behalf. The Complainant states that the Loss Adjuster attended the property on **6 November 2018** and met with the Complainant's husband.

The Complainant states that during this meeting the Loss Adjuster's representative *'confirmed that it was most likely subsidence and that he believed that [the Provider] would cover the damage and most likely look for subrogation from the Well Drilling Contractor'*.

The Complainant stated that following this she contacted a Chartered Engineer who prepared a report for the Provider. The Complainant states that the Engineer's report confirmed that subsidence had occurred at the property which could have been caused by well drilling.

The Complainant states that the Provider then appointed its own Chartered Engineer who visited the property. The Complainant states that this Engineer also *'confirmed that subsidence had caused the damage to the house'*. The Complainant submits that the Provider also appointed a Forensic Investigation Engineer company that did not visit the property but got their information from both reports issued by the Complainant's Engineer and Provider's Engineer as well as reviewing geological maps of the area around the property. The Complainant submits that the Forensic Engineer's *'also confirmed that subsidence had caused the damage to the property and they could not confirm for definite that the damage was caused by the well contractor'*.

The Complainant stated that in light of the information provided by all three Engineers, the Provider declined her claim on the basis that the damage to the property was a result of accidental damage for which she was not covered under the policy. The Complainant submits that all three Engineers confirmed that the damage was as a result of subsidence and she contends that subsidence was a condition that was covered under her policy. The Complainant further contends that all three Engineers could not determine the exact cause of the subsidence but they instead stated the drilling was the most likely cause.

The Complainant states that section eleven of her policy relates to subsidence and none of the exclusions noted in this section relate to her claim. The Complainant also states that the Endorsements as set out in her household policy document also references subsidence exclusions with one of these being accidental damage to buildings. The Complainant contends however that *'This endorsement was not included as part of the policyholders schedule which implies that accidental damage cannot and, is not an exclusion on the subsistence'*.

The Complainant states that at the time of taking out the policy, the Provider advised that the accidental damage section was to cover superficial damage like *'wine on carpet, knocking over a tv, ladder through a window etc'*. The Complainant submits that the Provider does not accept that it offered this advice and it remains that the claim declination was as a direct result of accidental damage.

The Complainant states that she does not accept the Provider's contention that accidental damage was the cause for the subsidence and she contends that:

*'If this was the case the majority of insurance claims could be attributed to accidental damage, which would mean the majority of household(s) are not sufficiently covered for any insurance claim'*.

The Complainant states that all reasonable efforts have been made to resolve the issue with the Provider's representatives and she details the damage that has affected this property in her Complaint Form to this Office. The Complainant further submits that both the damage incurred to the Property and the Provider's response in dealing with this, has led to *'immense levels of stress'* and in the meantime the property remains in a state of disrepair.

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### **The Provider's Case**

The Provider issued a Final Response Letter on **22 August 2019**. The Provider states that the Complainant called its offices on **5 November 2018** to advise that following work carried out by a Contractor who was employed to bore a well at the property, the Complainant noticed that cracks had appeared in the walls of her property. The Provider states that following this telephone call it appointed a Loss Adjuster to deal with the claim on its behalf.

The Provider states that the Loss Adjuster attended the site on **6 November 2018** and met with the Complainant's husband who stated that the Complainant was last at the site on **27 October 2018** and at that time, the Complainant had not noticed any cracks. The Provider states that the Loss Adjuster was informed that the Complainant had employed a well drilling company to drill a well near the property and they commenced drilling on site on **31 October 2018**. The Provider states that the drilling contractor attended the site again 2 days later on **2 November 2018** and it was at this point that '*extensive cracks were noticed to the walls of the house*'.

The Provider states that during its visit to the site, the Loss Adjuster could not determine whether the cracks were as a result of an insured event, for which the Complainant's policy provides. The Provider states that the Loss Adjuster then wrote to the Complainant advising this and consequently requested that the Complainant enlist a structural engineer so as to better establish the cause of the damage to the property.

The Provider states that it received the Complainant's appointed Engineer's report on **18 February 2019** and its own appointed Engineer's report on **12 April 2019**. The Provider states that upon receipt of these reports the Loss Adjuster issued a letter to the Complainant's Loss Assessor stating that the Complainant's claim was declined on the basis that:

*'The damage caused by the vibration of the drilling works is not an insured event covered by the policy and as a result, the damage caused by the vibration of the drilling cannot be considered under the subsidence event.'*

The Provider states that the Complainant's claim had been considered under insured events as per the policy booklet it issued to the Complainant. The Provider states that the policy covers subsidence and it submits '*(11) Subsidence or heave of the site on which the private house stands or landslip*'. The Provider states that upon review of the Complainant's claim, and given the complexities involved, it then sought the services of a Forensic Investigative Engineering firm so as to establish an independent opinion by way of review of the two Engineer reports previously provided.

The Provider states that the Forensic Engineer cited the three potential '*mechanisms for damage*' as '*Vibration, Activation of a karst feature and a Blow-out due to compressed air pressure during drilling*'. The Provider attached detailed summaries of all three mechanisms as laid out in the Forensic report, for reference in its Final Response Letter.

The Provider submits that the Forensic Engineer conclusion states that:

*'But for the well drilling activity, the damage to this house would not have occurred'*

The Provider also submits that it notes in its declinature letter sent to the Complainant on **29 May 2019** that:

*'...substantial vibrations from the drilling works caused previously filled cracked to reopen and fresh cracks to appear in the house. The damage caused by the vibrations of the drilling works is not an insurable event or peril covered under the terms and conditions of your policy'.*

The Provider states that it is aware of the Engineers' Reports that cite 'subsidence' as a cause for the damage to the Property, however the Provider contends that 'The key question is what has caused the damage?' and states that all three reports produced by three different Engineers agree that the damage caused to the property was as a direct result of the drilling and indeed had the drilling not taken place there would not have been any damage incurred. The Provider further contends that the Complainant's policy does not cover accidental damage and in this instance the damage incurred to the property was not as a result of subsidence and was in fact as a result of 'accidental' damage caused by the drilling.

### **The Complaint for Adjudication**

The complaint is that the Provider wrongfully repudiated the Complainant's claim thereby denying the Complainant payment for repair of her property. The Complainant says in this regard that the Provider ignored its own terms and conditions of the policy, relating to subsidence which afford payment to the Complainant. She also says that the Provider has wrongfully suggested that the claim was due to 'accidental damage', despite all three Engineers' reports stating subsidence as the cause.

The Complainant wants the Provider to accept the claim and states 'At this point [the Provider] have not even discussed scope of works required or any financial loss'.

### **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.

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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 September 2020**, outlining the preliminary determination of this office in relation to the complaint.

The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter. In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

### **Chronology of Events**

- **8 April 2014:** The Complainant's home insurance policy was incepted with the Provider.
- **27 October 2018:** The Complainant visited the site and was of the view that there were no abnormalities on the site.
- **31 October 2018:** The Complainant employed a contractor to bore a well at the property and work commenced at the site.
- **2/3 November 2018:** The Complainant noticed cracks on the walls of the property.
- **5 November 2018:** The Complainant contacted the Provider and advised the Provider that due to works that had been carried out at the site, by a Contractor to bore a well at the site, she had noticed cracks on the walls of her property. The Provider then appointed a Loss Adjuster to carry out an inspection at the site.
- **6 November 2018:** The Loss Adjuster attended at the site and met with the Complainant's husband.
- **25 November 2018:** The Complainant's structural engineer visited the site and carried out an inspection.
- **8 December 2018:** The Complainant's structural engineer re-visited the site and re-measured the cracks.
- **18 February 2019:** The Provider received the Complainant's appointed Engineer's report.

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- **28 March 2019:** The Provider's structural engineer visited the site and carried out an inspection.
- **12 April 2019:** The Provider received its own appointed Engineer's report.
- **29 May 2019:** The Declinature Letter was sent to the Complainant after the Loss Adjuster reviewed both Engineers' reports advising that the claim was declined as no insured event had caused the damage to the property.
- **11 July 2019:** The Loss Adjuster received the Forensic Engineer's Report which concluded that *"but for the well drilling activity, the damage to this house would not have occurred"*.
- **22 August 2019:** The Provider issued its Final Response Letter to the Complainant.

### **Policy Terms and Conditions**

The relevant terms and conditions that relate to this complaint are as follows:

**'Premises'** is defined on page 4 of the Policy Document as:

***"Premises***

*The Premises is defined as:*

- a) the private house, including fixtures and fittings therein and thereon. The private house must be constructed of brick, stone or concrete and roofed (at least 70%) with slates, tiles, concrete, asphalt or metal,*
- and*
- b) domestic outbuildings, garages, swimming pools, tennis courts, fuel storage tanks and their contents, septic tanks, terraces, patios, decking, driveways, footpaths, walls, gates and fences, lawns including fixtures and fittings therein and thereon,*
- and*
- c) any hedges, trees, shrubs and plants within the boundary of the Premises".*

**'Accidental Damage'** is defined on page 3 of the Policy Booklet as:

*"Sudden or unforeseen damage caused as a result of an unexpected action or event".*

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Page 6 of the Policy Document lists the events that the Provider will cover, subject to the terms, conditions, limits and exclusions:

***“Section 1: Premises***

...

***The Cover***

*We will indemnify You for loss or damage to the Premises by any of the clauses numbered (1) to (12), subject to the terms, conditions, limits and exclusions set out in this Policy”.*

I note that Page 8 of the Policy Document states the circumstances in which ‘*subsidence*’ will and will not be covered:

| <b><i>“What Your Policy Covers</i></b>  | <b><i>Excluding Loss or Damage</i></b>   |
|---|--|
| <i>(11) Subsidence or heave of the site on which the private house stands or landslip</i> | <ul style="list-style-type: none"> <li>• <i>resulting from demolition, structural alteration or structural repair,</i></li> <li>• <i>resulting from the settlement of made up ground,</i></li> <li>• <i>resulting from coastal, lake or river erosion,</i></li> <li>• <i>to walls, gates, fences, terraces, patios, driveways, footpaths, swimming pools and tennis courts unless the private house is damaged at the same time by this cause,</i></li> <li>• <i>resulting from the bedding down of any structure,</i></li> <li>• <i>to solid floor slabs or loss or damage resulting from the movement thereof unless the foundations beneath the external walls of the private house are damaged by the same cause at the same time”.</i></li> </ul> |

Page 9 of the Policy Booklet goes on to explain what ‘*Accidental Damage*’ is covered and also defines what loss or damage is excluded:

| <b><i>“What Your Policy Covers</i></b>  | <b><i>Excluding Loss or Damage</i></b>   |
|---|--|
| <i>(12) Accidental Damage<br/>This cover is only applicable if indicated in the schedule.</i> | <ul style="list-style-type: none"> <li>• <i>to the Premises other than to the private house,</i></li> <li>• <i>to any part of the private house which is lent, let, sub-let, or accommodating Paying Guests,</i></li> <li>• <i>by settlement and shrinkage,</i></li> </ul> |

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|  | <ul style="list-style-type: none"><li>• <i>caused by animals owned by or in the care, custody, or control of You or members of your Household,</i></li><li>• <i>caused by scratching, abrading or denting,</i></li><li>• <i>as a result of tree root action,</i></li><li>• <i>resulting from any weather related event,</i></li><li>• <i>which comes within the terms of any exclusion or limitation set out in this Policy including, but not limited to, paragraphs (1) to (11)".</i></li></ul> |
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**Analysis**

The Complainant’s claim was initially assessed by the Provider under **“Section 1: Premises, event 11”**, on page 8 of the Policy Booklet under event **“(11) Subsidence or heave of the site on which the private house stands or landslip”**.

The term ‘Subsidence’ is not defined within the policy.

The Complainant has submitted that:

*“All of the above three Chartered Engineers confirmed that the damage to the property was caused by Subsidence which is an insured event, however none of the three Chartered Engineers could confirm that the subsidence was caused by the well drilling contractor. They all confirmed that it was likely cause of the damage, however none of them could confirm that it was the definite cause of the damage”.*

Furthermore, the Complainant has submitted that:

*“We do not accept that [the Provider’s] Final Response that the Accidental Damage was the direct cause of the damage. If this was the case the majority of insurance claims could be attributed to Accidental Damage, which would mean the majority of household[s] are not sufficiently covered for any insurance claim”.*



In the Provider's submissions to this Office I noted the following:

*"..the event that happened was not Subsidence, as the activity that triggered the structural damage to the Complainant's property was caused by the drilling activity in the close proximity of the property, as evidenced in the three structural engineers' reports. The natural ground support and the surrounding substratum have been compromised as a direct consequence of the nearby drilling activity.*

*"As the damage to the property was visible immediately after the drilling works, the proximate event linked to the damage present was the drilling activity, and not Subsidence..."*

Furthermore, in the Provider's submissions it went on to say:

*"The renewal insurance documents issued to the Complainant on the 06<sup>th</sup> March 2018 note:*

*"Premises*

*Cover is provided for the structure of your home including domestic outbuildings, garages, swimming pools and tennis courts.*

*Accidental Damage cover on your buildings – **Not Selected***

*As the Complainant's policy does not provide cover for Accidental Damage to Premises, the claim could not be considered under this event".*

I noted in the Complainant's appointed Structural Engineer's Report dated **January 2019**, the following:

*"As the fresh cracking occurred in the short period of time after the drilling took place it is most likely that the drilling has dislodged soil, created a pocket or other voids which have contributed to the subsidence which has taken place.*

*This is particularly evident in the vicinity of Trial Hole (C), where a void had appeared adjacent to the footpath...*

*Summary and Conclusions*

*Consideration should be given to locating the proposed well further away from the house. It is most likely that the Driller selected this location due to the ease of access to this location. It was noted that an old well and pumphouse is located circa 30 metres from the house (photograph 40).*

*Repair to the house structure is going to pose some difficulty. The floor adjacent to the gable has already sank by circa 50mm. Even the introduction of mini piling will not be sufficient to raise the floor levels to the original plane.*

*..."*

[Underlining added for emphasis]

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Following on from the Complainant's Structural Engineer's Report the Provider appointed its own Structural Engineer. In the Provider's appointed Structural Engineer's Report dated **12 April 2019**, I noted the following:

*"On the evidence, it does appear that the cracks due to subsidence have occurred at this property relatively recently. Many of the cracks look fresh and any previously filled cracks that have reopened appear to have opened to a wider extent than before.*

*The drilling works were carried out 5.6m from the affected gable end of the house. If these cracks only appeared after the well drilling works, then it is probable that vibrations from drilling through rock contributed to the subsidence that has taken place.*

*It is claimed that [the Contractor] carried out an external video survey of the property before and after drilling works. This video, if it exists, would help to conclusively determine whether the cracking was caused by the drilling operations".*

[Underlining added for emphasis]

I note that, following on from both the Complainant's and the Provider's Structural Engineers' Reports, the Provider employed a Forensic Engineer who reviewed the parties' engineers' reports and in their own report of **July 2019** noted as follows:

*"Background*

- *Structural damage to the house was first observed on the 3 November 2018 (within 3 days of the drilling). There has been some progression in the cracking since then;*
- *...*
- *Further investigations included the digging of trial holes to a maximum depth of 1.8 metres, which found mixed soil conditions, being loose loamy soil, gravelly soil with some peat, and gravelly soil with clay. A void was observed in the ground beneath the footpath."*

The Forensic Engineers considered 3 potential mechanisms for damage as follows:-

**1. Vibration.**

*"In summary, we believe that the vibrations created during the well drilling process were noticeable to the homeowner, but were not the cause of the structural damage that this house has experienced".*

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## 2. Activation of a Karst Feature.

*“A karst feature is a geological feature that occurs when the percolation of water through limestone slowly causes the rock to become dissolved, resulting in wide areas of land that contain underground drainage systems, which tend to be largely concealed from view. Turloughs, springs, and sinkholes are common features of karst area...”*

*In summary, with the available information, we believe that a likely cause of the damage to the Insured’s house was changes in the site’s groundwater conditions and underlying bedrock, caused by the well drilling activity.”*

## 3. Blow-out due to compressed air pressure during drilling.

*“Blow-out, or the sudden loss of air or gas pressure from a source within the ground, is a risk during the type of pneumatically assisted drilling activity that occurred on the insured’s site shortly before the damage to the house was discovered...”*

*In summary, with the available information, we believe that a likely cause of the damage to the Insured’s house was changes in the site’s soil conditions, caused by the well drilling activity.*

### **Conclusions**

*For the structural damage affecting the Insured’s house, three potential mechanisms for damage have been considered. Based on the information available at present, our assessment is that:*

- A. *Vibration during the well drilling is unlikely to have caused the damage to the house, because of the low vibration intensities associated with this type of drilling, even allowing for the relatively close proximity between well and house.*
- B. *The damage to the house is likely to have resulted from one of the following mechanisms, both of which were caused by the well drilling activity:*
  - i. *Activation of a karst feature within the bedrock.*
  - ii. *Blow-out from compressed air equipment.*
- C. *But for the well drilling activity, the damage to this house would not have occurred”.*

[Underlining added for emphasis]

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Having considered all of the engineering reports available to the Provider, I take the view that it was a reasonable conclusion for the Provider to draw, that the drilling activity in the days before the cracks appeared, contributed to the damage to the property. The Provider's own expert reports appear to me to accept however that the cracks to the property occurred due to subsidence (as distinct from vibrations) in the context potentially of the activation of a karst feature within the ground, or a blow-out from compressed air equipment extensively disturbing the structure and placement of the soil.

I note that in order for a valid claim to be made under the policy, it is a matter for the policyholder to demonstrate that the damage is attributable to one of the insured perils. The burden of establishing that the loss was caused by an insurer peril, rests with the policyholder. I note in that regard that the policy provides at Section 1 for the Provider to indemnify the Complainant for loss or damage to the property by any of the clauses at 1 – 12, subject to the terms, conditions, limits and exclusions set out in the policy.

In that regard, clause 11 confirms that cover is available for:

*“Subsidence or heave of the site on which the private house stands or land slip ... to solid floor slabs or loss of or damage resulting from the movement thereof, unless the foundations beneath the external walls of the private house are damaged by the same cause at the same time”.*

I note in that regard that there is no suggestion in the evidence made available to this office, that there was damage to the foundations beneath the property. Indeed the Provider's response to this complaint confirms that cover under “Subsidence” was considered by the Provider, which took the view that:

*“All 3 reports confirm that the damage caused to the Complainant's property is attributed to the well drilling activity. Had the drilling activity not occurred, there would have been no damage to the property. I believe that the evidence presented by the engineers in relation to the nature of structural damage existing at the Complainant's property is very important, as it clearly indicates that the direct cause of the damage was the well drilling works that took place in the close proximity of the house.”*

Having considered the evidence before me, I do not agree.

It is certainly the position that the three engineering reports acknowledged that the well drilling activity “contributed” to the subsidence which occurred. The policy exclusions laid out within the policy document submitted in evidence do not however, in my opinion, place a policyholder on notice that in the event of subsidence, an indemnity will not be made available by the Provider if the insured peril has been contributed to by the act of a third party.

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I note that the Provider has indicated that the Complainant's policy does not include cover for accidental damage. I take the view that "accidental damage" is of limited relevance in this situation, as the Complainant's policy included cover for subsidence causing loss and I take the view on the basis of the engineering reports which were available to the Provider, that it was not reasonable for the Provider to decline the claim. In my opinion, the engineering reports bear out the opinion that the loss was caused as a result of subsidence, in the form of movements in the soil, noted to have been contributed to by the drilling.

In those circumstances, on the basis of the evidence before me I consider it appropriate to uphold this complaint and to direct the Provider to admit the Complainant's claim, and to then proceed in the usual manner with the assessment of benefit to be paid to the Complainant. It will be a matter for the Provider to pursue the drilling company and/or its insurers for such contribution as it believes to be appropriate, in the event that it considers such a step to be warranted.

### **Conclusion**

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is upheld on the grounds prescribed in **Section 60(2) (b) 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 rectify the conduct complained of, by admitting the Complainant's claim, for assessment of benefit to be paid to the Complainant pursuant to the policy, as expeditiously as practicable.
- 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.



**MARYROSE MCGOVERN**  
**DEPUTY FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

15 October 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—

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- (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.**

