An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

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| **Decision Ref:** | 2020-0482 |
| **Sector:** | Insurance |
| **Product / Service:** | Household Buildings |
| **Conduct(s) complained of:** | Rejection of claim |
| **Outcome:** | Partially upheld |

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

### Background

The complaint relates to a claim under a House Insurance Policy covering defects to the property. The complaint concerns the Provider's denial that pyrite is causing damage to the Complainants' property. In an earlier Decision of **20th May 2016** the Financial Services Ombudsman, directed that an independent third party engineer be selected by the parties to conduct investigations and to produce a report on what was causing the damage to the Complainants' property. It was directed that if it was established that there was an insured defect with the property, liability was to be accepted and the Provider was to have remedial works carried out.

It is the Complainants' view that ultimately, the last step in the process should have been the implementation of the independent opinion from the appointed engineer. The Complainants are satisfied that the direction of the Ombudsman has been carried out and they now have an independent engineer's opinion which supports the opinion provided by the Complainants' original engineer.

The Provider argues that the fact that (i) the geological reports (that it had arranged) on pyrite levels at the Property were never provided to the appointed Consultant Engineer for the purpose of the Consultant Engineer's **4th April 2017** report and (ii) the Complainants' asserted instruction to the appointed engineer not to respond to the Provider's representatives, renders flawed the entire appointed Consultant Engineer's inspection of, and report on the causes of, the damage at the Complainants' property. The Provider considers that the direction that an independent third party engineer be appointed to inspect and report on the Property has not been complied with.

The Complainants' complaint is that following the Consultant Engineer's assessment, the Provider is now (i) incorrectly and unreasonably suggesting that the Consultant Engineer did not fulfil the mandate directed by the Ombudsman and (ii) is incorrectly and unreasonably requesting further inspection by another engineer with further testing and investigations on the Property.

The Complainants want the Provider to admit the claim and remedy the damage to their Property.

**The Complainants' Case**

On reviewing the response provided by the Insurance Company, the Complainants made the following comments:

> *"We strongly dismiss the suggestion by the Insurance Company that we intentionally omitted to include all evidence, and in turn, were not fully compliant with the mandate set out by [Financial Services Ombudsman] office. As you will see from the summary file, the level and volume of correspondence on this file are extensive with the independent engineer … noting that it is one of the most complicated cases he has reviewed to date. He had vast amounts of correspondence to go through with contradictory information from different experts/ parties. We as homeowners have tried to the best of our ability to keep on top of complicated correspondence and unjust demands from the Insurance Company, and in providing the Ombudsman summary file, we did so in good faith, satisfied that it provided a comprehensive and historic overview of the case, including any factual reports and any relevant opinions (including those of [Expert Geologist]).*
>
> *As the independent engineer … carried out the mandate instructed by [the Financial Services Ombudsman], the Insurance Company were equally well positioned to request that certain detailed opinions were reviewed by [Consultant Engineer], instead of assuming that certain reports presented by their own advisors were highlighted. The Insurance Company were kept informed at all time of [Consultant Engineer's] plan and schedule. However, at the time, they had no comments/feedback or objections in relation to the proposed plan outlined to them by [Consultant Engineer].*
>
> ***Opinions of [Expert Geologist]***
> *In response to the Insurance Company's argument that [Expert Geologist] opinions (as a geologist) were omitted, and that [Consultant Engineer] did not have full access to all relevant reports, we have the following points to note:*
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> - *The Ombudsman remit (08.06.2016) advised, 'that the Independent Engineer should have access to* ***the previous Engineer reports*** *and these*

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*reports together with the newly appointed engineer's independent review should form the basis of any final determination'. The independent engineer …, confirmed that they were provided with all 3 engineer reports.*

- *[Consultant Engineer] was also provided with all 4 geology reports (3 reports from ground investigation company and 1 report from ground investigation and geotechnical company). [Expert Geologist] did not provide a geology report; [Expert Geologist] gave opinions, in his internal memos to [the Provider], based on the factual evidence provided in the above-listed geology reports.*
- *[Consultant Engineer] was tasked with providing an **independent** review based on all the factual evidence available. [Consultant Engineer], therefore, appropriately based their conclusions on the factual evidence available in the Geology and Engineer reports. It is not realistic for [Consultant Engineer] to predicate their conclusion based on the conservative opinions of [Expert Geologist] (the company's paid retained expert) rather than the factual information available.*
- *[Expert Geologist] gave opinions, he did not give an emphatic declaration with absolute certainty.*
- *[Expert Geologist] did not suggest any 'alternative proximate causes' in his memos.*
- *The November & December 2015 reports of [the Provider's Engineer] (.. the Insurance Company's paid retained engineer), which detailed the Insurance company's reason for declining our claim, were both provided to [Consultant Engineer]. Both reports stated: 'All of the geological reports were reviewed by International Expert, [Expert Geologist] and in each case, he has determined that damage is unlikely from this material'", therefore the insurance company cannot argue that [Consultant Engineer] was not made aware of [Expert Geologist's] opinions in making their conclusion.*
- *Furthermore, the FSO's finding report (20.05.2016) which was also provided to [Consultant Engineer] concisely summarised **all** [Expert Geologist's] main points, not just the cherry-picked points provided in the [Provider Engineer] reports or by the Insurance Company in their latest correspondence.*

*It is worth re-highlighting that [Expert Geologist] confirmed in relation to our fill:*

- *'The findings are consistent with pyrite oxidation and gypsum precipitation occurring or having occurred in the fill, giving it the potential to expand and cause damage'*
- *[Expert Geologist], in his email to [the Provider and Provider's engineer] (20.06.2012) states: 'This fill may expand over a longer timeframe'*

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- *Confirmed the existence of Pyrite in our fill, his report confirmed our fill had expansive pyrite with 'potential to expand and cause damage'.*

***Discounting of entities not retained/linked with the Insurance Company***

*We strongly refute that the Insurance Company dismisses & discounts the creditability of [Consultant Engineer's] assessment (as well as that of the previous independent engineer (Complainants' Engineer). By doing so, it undermines the mandate as instructed by [the Financial Services Ombudsman] and the logic for appointing an 'Independent' engineer.*

*When Engineers Ireland originally provided a listing of 31 engineers deemed suitable to carry out an 'independent' assessment, the Insurance Company objected to 26 of the 31 engineers (83%) (unfairly in our opinion). Of the remaining 5 engineers acceptable to the Insurance Company, 2 were from the firm [of Consultant Engineer].*

*This in itself clearly suggests that the firm [Consultant Engineer] was held in high regard by the Insurance Company and that they valued their expertise and independence.*

*The competence of …, a Senior Structural Engineer and Associate Director at [Consulting Engineer] is publicly supported: … [a link is then included]*

*Additionally, we strongly feel that [Provider's engineer / the Provider] is not rightly placed to dispute and belittle the competency of [the Consultant Engineer]. We witnessed similar behaviour against the competencies of [Complainant's engineer] when they also did not agree with the opinion of the insurance company's Engineer. The opinions provided by the 2 independent engineer firms should be accepted as solid and given the merit and weight they deserve.*

*It would appear that [the Provider's engineer's] advice is strongly biased and formulated in the interests of the Insurance Company. If any evidence does not suit his agenda he either ignores it or dismisses the capability, independence and qualifications of the professional making the argument. He also cherry-picks favourable quotes from reports which suit his arguments and ignores any arguments that do not suit his opinion.*

*It is disappointing to see the Insurance Company discrediting [Consultant Engineer]. These statements are not credible given our case has demonstrated numerous flaws/ weakness with their own engineer …. For example, [Provider's engineer], the Insurance Company's paid retained Engineer, in repudiating our claim:*

- *incorrectly made reference a **'threshold trigger'** in our policy that does not exist*

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- *incorrectly predicted that he would expect no further damage to our house if a monitoring period was implemented*
- *advised FSO that we do not meet **'IS398 standards'** even though these standards are not applicable to our policy*
- *suggested that we needed to provide evidence of proximate cause, (even though this wording is not in the policy)*
- *advised that we had not provided a proximate cause despite the fact that we had presented evidence of pyrite in our infill, its expansion potential together with evidence of structural damage.*
- *did not provide a reasonable alternative proximate cause of our damage*
- *wrongly accused us of lying in our dealings with [the ground investigation and geotechnical company].*

***Independence of [Consultant Engineer]***

*It is simply negligent for the Insurance Company to suggest that [Consultant Engineer] did not act in a truly 'independent' capacity and that we may have been affiliated with [Consultant Engineer]. The Insurance Company's statement that [Consultant Engineer] considered us as homeowners to be 'its client' is totally unfounded. From a review of correspondence .. we note that it is the Insurance Company who in fact **twice** refer to us as [Consultant Engineer's] client, which in turn prompts [Consultant Engineer] to respond using the term 'our client'.*

- *Email dated 21st July 2017 from the Insurance Company to [Consultant Engineer] 'your lack of response is currently prohibiting the timely determination of **your clients** claim'*
- *Email dated 15 August 2017 from the Insurance Company to [Consultant Engineer] 'Could you please urgently provide us with same as your lack of response is currently prohibiting the timely determination of **your client's** claim'.*
- *[Consultant Engineer] duly responded on 15 August 2017 'My client had instructed me not to respond'.*

*It is pathetic that the Insurance Company has made this **sinister** suggestion and questioned the 'independence' of [Consultant Engineer]. In fact, one would say that this is another attempt by the Insurance Company to add another layer of complexity to the case and it clearly demonstrates the unacceptable conduct of the Insurance Company to try to get the decision to go their way by any means possible.*

*We are also satisfied that the Ombudsman instruction for an 'independent' review was clearly noted within the introductory letter to [Consultant Engineer]. In fact, the Ombudsman mentioned three times in the remit (provided to [Consultant Engineer]), that the engineer was to act in an **independent** capacity. Therefore, [Consultant Engineer] would have had no doubt that they were working in an independent capacity …. .*

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*It is interesting to note that the Insurance Company now questions the independence of [Consultant Engineer], **only** after [Consultant Engineer] concluded that the damage to our property was Pyrite related.*

*For the record, we completely refute the allegation that we have any allegiance with [Consultant Engineer] or vice versa – we had not heard of the firm before they were listed as a suitably qualified engineer by Engineers Ireland.*

***Insurance Company's suggestion of new engineer and further testing***

*The Insurance Company is now suggesting adding another layer to this already complicated and stressful case by suggesting the appointment of yet another engineer and further inspections. It is blindingly obvious that this proposal is unreasonable, disingenuous and an attempt to further drag out this case:*

- *The Insurance Company have already stressed to us, that any new evidence found in our favour cannot be used by us, as the policy period expired in January 2014.*
- *The house has been painted and repaired numerous times since the policy expiration; we do not believe the conditions exist for any newly appointed third party engineer to accurately report on historic damage that occurred between Jan 2004 - Jan 2014.*
- *There have now been **5** independent Engineer reports produced in relation to our house on top of **3** separate Geology reports/excavations over a 7 year period, all confirming Pyrite related damage.*
- *In terms of appointing yet another engineer, we would be at a serious disadvantage, we don't have the technical expertise nor have we a dedicated appointed engineer with our genuine interests in mind, the Insurance Company has two paid retained experts.*
- *Given the challenge noted above in appointing an independent engineer, the suggestion to appoint another independent engineer is worrying.*
- *It took [Consultant Engineer] over 4 months to produce the independent report. The [Consultant Engineer] acknowledged that this was one of the hardest cases he has ever undertaken, with vast amounts of correspondence to go through including contradictory information from different experts/ parties.*
- *The Insurance Company accepted that the burden of proof, to provide an alternative proximate cause switched to them in 2012 (over 7 years ago)*

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***The rationale for suggesting [Consulting Engineer] not correspond further with Insurance Company***

*The Insurance Company is now claiming that we were premature in submitting a new complaint [to the Financial Services and Pensions Ombudsman] and that our new complaint should not be progressed. For clarity, we detail below our rationale for requesting [Consultant Engineer] not correspond further with the Insurance Company:*

- *[Consultant Engineer] had completed the Ombudsman's remit, they answered the three specific questions put forward in the Ombudsman's remit and concluded the reported damage was most likely pyrite related.*
- *The Insurance Company was looking to carry out non-specific testing, which they were unable to clarify when we asked on two separate occasions for additional specific details.*
- *The Insurance Company only wanted to focus on the damage in one particular area and tried to conveniently dismiss all other damage previously reported.*
- *The Insurance Company in dismissing the opinions and credibility of [Consultant Engineer's] independent report treated their own paid retained expert's opinions as facts. Engineers can only give their expert opinions; no engineer is going to give 100% certainty re the cause of any damage.*
- *We had already notified the Ombudsman that we were submitting a new complaint against the Insurance Company.*
- *The Insurance Company provided no evidence in relation to an 'alternative proximate cause'.*
- *The Insurance Company/ [Provider's engineer] wrongly stated that the task of [Consultant Engineer] was to establish an alternative proximate cause for the damage. This is not correct [Consultant Engineer] – "was tasked with giving an opinion on whether the damage to our house was* ***more likely*** *caused by another proximate cause other than Pyrite".*
- *The Insurance Company in their letter dated 16th of June suggested that the Independent Engineer .. would know what further testing would be required to find an alternative proximate cause. We spoke to the [Consultant Engineer] and he did not know what further testing would be merited, they had completed their mandate and concluded that the likely cause of the reported damage to our property to be Pyrite.*

*For the above reasons, [Consultant Engineer's] report should be accepted on its own merits and not open for further scrutiny.*

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***Insurance Company formally noting weaknesses in their case***

*…*
*Reviewing [the Provider's] notes, it becomes clear that the Insurance Company were fully aware that they had provided misleading information to us in their previous correspondence, including the fact that:*

- *They advised the homeowner that there was a **Threshold Trigger**; however, their internal notes confirm the policy has no Threshold trigger*
- *Their notes confirmed **no** level of damage was required.*
- *They confirm that the requirement is not physical damage to the structure but any damage.*
- *The document stated that the **FSO** will pick up on the fact that the homeowners **'fill will expand over a longer period'** and that the homeowner has shown that **damage occurred during the policy period'.***
- *The Insurance Company had been clear that their experts considered that cracking would not expand, yet the policyholder had provided evidence that '**cracking had progressed'.***

*It would appear that the Insurance Company brushed these weaknesses under the carpet and ignored them in the hope that the FSO would not pick up on them.*

*In our opinion, this demonstrates that the Insurance Company is biased, is not acting transparently and they are clearly not acting in the best interests of their client.*

*Even though our claim is over 7 years old, the Insurance Company has already stated that they plan to appeal the Ombudsman's decision to the High court, (if and when they expect the Ombudsman to rule against them).*

*This document clearly notes that damage occurred during the policy period. The fact is, our actual policy has no threshold of damage requirement. It is not necessary to prove the cause of the insured peril as the definition does not require it. It merely requires the demonstration of physical loss, destruction or damage due to a defect as defined".*

The Complainant then goes on to set out the definition in the Policy of Major Damage. The Complainant then stated:

*In our previously attached letter, the independent Engineer [letter from the Complainants' engineer] stated definitively that the damage to our house*

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*constitutes 'Major damage' as defined by the … policy. This opinion has now been backed up and reaffirmed by the newly appointed [Consultant Engineer].*

*The Insurance Company in their previous correspondence refused our claim advising that we did not prove* ***' cause and effect'*** *even though this stated requirement is not in line with the policy documentation.*

*Furthermore, our house is classified as '* ***Amber Certificate' -*** *Hard-core susceptible to limited or significant expansion, monitoring of the damage is most likely required. In our opinion, The Amber Certificate by definition suggests a defect is present. A house in Amber means it has Pyrite. It will not disappear it can only go in one direction and get worse.*

*We originally put our house up for sale in 2012 and seven years later we are still in a situation where the Insurance Company refuses to repair our house. Without a Green Certificate, we are not in a position to sell our house. …*

*The Complainants concludes:*

*"..., it is clear to us that, [Consultant Engineer] were suitably qualified, acted independently and gave an independent opinion.*

*In overall summary, we have demonstrated within the policy period;*

- *we have Pyrite,*
- *we have Pyrite in which chemical reactions have taken place,*
- *we have damage consistent with Pyrite damage which progressed over the years,*
- *'major damage' has been satisfied in accordance with the wording of the policy document as per two independent engineers and*
- *no other plausible proximate causes have been established".*

The Complainants then asks:

*"Is the Insurance Company comfortable making statements advising that the damage demonstrated in our house is not due to Pyritic heave, whilst at the same time the Insurance Company's experts have not provided any relevant evidence or validation of an alternative proximate cause?"*

The Complainants go on to state:

*"Furthermore, our house is in close proximity to a number of houses which due to pyrite presence and damage, have been repaired by the Insurance Company. While we appreciate all cases are reviewed individually, it must be acknowledged that it is very unfair/unjust that neighbouring houses which were all constructed at the same time have been remediated due to pyrite damage.*

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*We bought this family home in good faith. The Insurance Company seem to think that this case can go on indefinitely and the current position taken by the Insurance Company is unsettling. In their letter dated the 25 of February 2014, they reminded us that our Policy had expired and that your claim could not be kept open indefinitely, yet they now suggest prolonging this case".*

**The Provider's Case**

The Provider states that it was the understanding of the Provider and its expert engineer that the Complainants had provided the Consulting Engineer with all the engineering reports.

The Provider submits that it was never told by the Complainants what information/documentation/instructions were being sent to the Consulting Engineer which the Complainants *"unilaterally"* (the Provider's emphasis) sent to the Engineer on 23 August 2016.

It is the Provider's position that geological reports were never sent to the Engineer, and this was unknown to the Provider at any point before the completion of the Engineer's Report and investigations. The Provider states that further, it was never provided with advance access to the instructions which the Consulting Engineer were sent. .

The Provider states that to this end, in paragraph 1.2 of that Report, the Consultant Engineer lists the information that they reviewed for the purposes of preparing their Report, as follows:

(i) the Complainants' engineer's Reports of March 2012, December 2013 and March 2015;
(ii) the Provider's engineer's letters of June 2012 and 17 November 2015;
(iii) the ground investigation company reports of May 2012, 25 September 2014 and 19 November 2014; and
(iv) the ground investigation and geotechnical company report of 10 December 2014.

The Provider notes that the Engineer's report makes no reference to the expert geologist instructed by the Provider to:

(i) provide a determination on the make-up of the infill material under the ground floor slab at the Complainants' Property; and
(ii) give his expert opinion on whether such materiel contributed to the cracking damage at the Complainants' Property.

The Provider submits that the opinions expressed by the expert geologist, as a leading world expert in the field of pyritic heave / pyrite degradation and independent expert in

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this area, are highly relevant to the issues under consideration by the Consultant Engineer and, therefore, the Provider says it would expect them to have been referenced in the report if they had formed part of the Engineer's review.

The Provider states that it was unknown to the Provider that the Complainants had omitted to provide the geological Reports to the Engineer. The Provider further states that the Consultant Engineer report of 4 April 2017 outlined that *"the survey was purely superficial and no opening up was undertaken".*

The Provider submits that in respect of the "appointment and instruction of the proposed engineer", the Provider would note in particular - as set out in its 18 May 2017 letter to the Financial Services Ombudsman - that the Provider can prove that the geological report dated:

(i) 20 June 2012 was forwarded to the Complainants by the Provider by email dated 29 January 2014:
(ii) 18 March 2014 was forwarded to the Complainants by the Provider by email dated 8 May 2014 and
(iii) 12 December 2014 was forwarded to the Complainants by the Provider by email dated 18 December 2014.

The Provider states that further as attached on 28 June 2016, the Complainants wrote to the Provider to set out:

> *"[the Provider] ..seem to suggest that they will have some involvement in the choosing of an independent engineer. For the record we would like to clarify that we have a huge objection to [the Provider] being in any way involved in the process".* (The Provider's emphasis)

This office questioned the Provider as to what extent the Provider communicated with the appointed engineer from the outset, particularly with regard to what items of evidence it wanted the engineer to consider when preparing his report. In seeking the answer to this question this office referred the Provider back to the letter of 28 June 2016 from this office regarding the information that was to be considered by the engineer.

The Provider's response was that as set out above, given the FSO's specific instruction that *"...an opinion as to .. . any damage to the property, based on the inspection of the property and based on all the evidence previously submitted"*, (Provider's emphasis) it was the understanding of the Provider that the Complainants had provided the Engineer with a full suite of the engineering reports (being reports relevant to both the Complainants and Insurers) necessary to complete the FSO-directed independent review. The Provider therefore states that it assumed the Complainants had complied with [the Financial Services Ombudsman's] instructions and provided 'all the evidence' when unilaterally appointing the Engineer on 23 August 2016.

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The Provider states that furthermore it raised clarificatory enquiries in writing with the Engineer by e-mail dated 6 July 2017 in relation to the Engineer's report of April 2017 report. The Provider asserts that it was entitled to do this, consistent with FSO's 28 June 2016 confirmation that:

> *" ..it was always the intention that the new engineer will give an opinion and not make a final determination on the claim. For the avoidance of any doubt, the claim determination remains with the insurance company, but should that determination be that the claim does not meet the policy criteria for payment, the Complainant can, at his discretion, refer the matter back to this office as a new complaint for a finding from this office..."*

The Provider states that the 6 July 2017 correspondence to the Engineer was part of the Provider's "claim determination".

The Provider states that upon the Engineer being chased for a response to the Provider on 15 August 2017, the Engineer confirmed to the Provider on the same day that *"my client had instructed me not to respond"* (the Provider's emphasis). The Provider also submits that the Complainants confirmed in their 14 May 2018 letter that they:

> *"...advised [the Engineer] not to respond to the insurance firm as they had requested further non — specific testing at that stage we had decided to lodge a new Complaint... "*

The Provider submits that the Engineer confirmed in their letter of 8 June 2018:

> *"...No copies of [geologist's] advices dated 20 June 2012, 18 March 2014, 20 May 2014, 24 November 2014 and/or 12 December 2015 were provided for review A copy of the Ombudsman report ... dated 2016 and ombudsman finding were provided but did not form part of the engineering review..."*

*"As stated in our e-mail of 15 Aug 2017 to [the Provider] we were instructed not to respond at that stage..."*

The Provider's position is that:

(1) despite the fact that it should have been appointed as an independent expert pursuant to the direction of the FSO on 20 May 2016, the 15 August 2017 Consultant Engineer's e-mail makes clear that:

> a. The Consultant Engineer at all times considered the Complainants to be its client; (the Provider's emphasis)
> b. far from both the Consultant Engineer Property inspection and the critical 4 April 2017 report being independent, they were in fact carried out and prepared by an expert who considered itself to be engaged by only one party.

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(2) that being the case, the Consultant Engineer report simply cannot be regarded as independent and certainly should not be considered so by the FSO for the purposes of the Complainants' new complaint, or otherwise;

(3) further, if there was any doubt about how the independent expert process ordered by the FSO has been compromised, that is put to rest by the further confirmation of the Complainants that they *"unilaterally"* (the Provider's emphasis) instructed Consultant Engineer not to respond to the Provider's legitimate 6 July 2017 queries, as if the Consultant Engineer was the Complainants' expert.

The Provider states that in light of the above, it can only be concluded that the FSO's 20 May 2016 direction that an "independent third party engineer" be appointed to inspect and report on the Property has not in fact yet been complied with.

The Provider states that that being so, the new 28 September 2017 complaint by the Complainants is entirely premature and should not be progressed further pending:

(i) an inspection of, and report on, the Complainants' Property by a truly independent expert, in line with the FSO's 20 May 2016 direction
(ii) with that expert being instructed by way of instructions and documentation that should be agreed in advance by both the Complainants and the Provider prior to being submitted to the expert in question (including the full geologist's reports).

The Provider was asked by this office whether there has been any monitoring of the changes to the Complainants' property since it was last examined by the Provider's experts, and if so has there been further deterioration to the Property. And what does the Provider put such further deterioration down to?

The Provider's response is that it is not aware of further deterioration.

The Provider was asked by this office whether there has been any other insured peril identified by the Provider as causing the damage to the Complainants' property.

The Provider's response was that on 14 May 2014 the Provider refused to provide the Complainants with an indemnity under the applicable Policy (the "Policy") for cracking damage at the Property. That damage had been noted for the first time in the Complainants' appointed Engineer's report of 22 March 2012, in respect of which the engineer further reported on 12 December 2013.

The Provider submits that the denial of cover was based on geological input from the expert geologist on 20 June 2012 and 18 March 2014 that:

> *"1. The amount of the pyrite present is low;*
> *2. There are only traces of gypsum, which is the main expansive mineral…*
>
> *…I confirm that there is insufficient evidence of expansion of the fill for me to diagnose that fill has caused the damage reported in [the Complainants'] correspondence. "*

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The Provider submits that the position has not changed.

The Provider also submits that there has been no further insured peril identified by the Provider as causing the damage to the Complainants' Property.

The Provider states that the (uninsured) causes are identified in the Reports of 25 April 2017 and 3 July 2018 and identified in its responses.

The Provider was asked by this office as to its positon on the Complainants' assertion that the appointed engineer's report, is to be the basis upon which the claim outcome is to be decided.

The Provider's response is that the Consultant Engineer's Report should not form the basis upon which the claim outcome is to be decided.

The Provider reiterates the suggestion contained in its previous correspondence that the best means of resolving all matters would be for the FSPO now to direct that:

*(i)* *"the independent engineering inspection and report be re-done by a newly appointed expert (to be paid for by [the Provider]), who should be instructed on the basis of agreed instructions and documentation;*

*(ii)* *as part of that process, the independent engineer should receive instructions — from [the Provider's] engineer - as to what precise form of testing [the Provider's] engineer requires the independent engineer to carry out to establish whether there are alternative proximate causes for the cracking damage besides alleged pyrite (thereby addressing the Complainants' repeated concern that allegedly "non-specific" testing was sought by Insurers in their engineer's 25 April 2017 response to [the Consultant Engineer Report]);*

*(iii)* *the independent engineer, having reviewed all submitted documentation (including geological documentation comprising [the Expert Geologist's] reports), and having inspected/tested the Property as above, should prepare and submit an independent opinion on whether the cracking damage is the probable consequence of pyritic heave, or some other proximate cause, that occurred and caused cracking damage prior to expiry of the Policy on 21 January 2014;*

*(iv)* *if Insurers dispute those findings, the Complainants should then be free to make a second reference to the FSPO for determination of whether the cracking damage is covered under the policy terms".*

The Provider states that having spoken with its own engineer in respect of the Consultant Engineer's Report, it is the established and stringent professional view of both the Provider and its experts, that the majority of the cracking evidence points to the cause of damage being something other than pyrite for the reasons given in the reports of its

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engineer and those of the Expert Geologist. The Provider submits that the Expert Geologist is the globally renowned expert in this field, whilst its appointed engineer is also a leading consultant on pyrite matters across Europe.

The Provider states that in this regard its appointed engineer's 5 April 2017 and 3 July 2018 reports both set out that the cracking is not pyrite-related.

The Provider submits that the other alternative plausible reasons for the rear wall cracking illustrate that the cracking is not as a result of pyrite but some other (uninsured) cause that requires further investigation.

The Provider states that to this end, its appointed engineer's 25 April 2017 report sets out that:

> *".. we believe it necessary to review the primary 4 items of damage that were being relied upon to confirm pyritic heave damage:*
>
> 1. *Significant variations in the floor levels in the hall and living room*
> 2. *Localised cracking of floor tiles in the rear kitchen area at the patio door*
> 3. *Some "new" mitre cracking at door opes although no new ones were evidenced by photos.*
> 4. *A vertical crack is present at the top RHS of the rear elevation at the top of the patio door.*

The Provider submits that it is the position in its engineer's report, and the detailed reasoning therein in particular on pages 9, 10, and 11 of the 25 April 2017 Report, that pyrite-related heave has been discounted as the cause of items 1, 2 and 3 above. The Provider states that as set out in the engineer's Report of 25 April 2017 there are logical and detailed reasons set out in this context, including feasible alternative causes i.e. floor finishes and/or the original finish of the sub-floor slab, or natural shrinkage/settlement. The Provider submits that 25 April 2017 Report sets out that:

> *"Item 1 has now been proven to be due to the floor finishes and/or the original finish of the subfloor slab as originally suggested by this office in 2012.*
>
> *Item 2 is now discounted as no displacement of the floor slab has occurred and in our opinion the tiling has been laid in a poor manner without any required movement joint at the door threshold.*
>
> *Item 3 can also be discounted. The mitre openings are in the softwood architrave only (no issue with any door or door frame) coupled with [Consultant Engineer's] confirmation that no upward displacement of the floor slab has occurred, this issue is an original shrinkage of the Softwood (commonly found) coupled with normal flexing of the timber frame stud wall. To date, our practice has never seen a gap in an architrave without corresponding damage /distortion in the same door frame / top architrave, where pyritic heave was the cause. Distortion of architraving on its own is not given any consideration in the Irish Standard IS398 Part 1:2003...*

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*In conclusion, we remain wholly satisfied that pyrite expansion is not the cause of the damage reported to this property …"*

The Provider submits, in the context of item 4, its engineer's Report of 3 July 2018 further sets out:

*"10...1 believe that the conclusion within the [Consultant Engineer] report is flawed especially in light of consistent geological results of the stone fill material and [Expert Geologist's] conclusions. We must therefore consider other possible reasons for the crack".*

*11. Largely this crack would be categorised as a non-structural one in accordance with BRE Digest 251, …. However, such a crack would in my opinion not be present unless there has been some structural movement of the construction...*

*12.In my opinion this localised cluster of cracks is not random and may indicate a localised foundation settlement issue that warrants further investigation. It may ultimately be our conclusion that such movement was temporary and that the cracks can now be repaired using standard techniques. However I believe that it is necessary that [Provider's engineer] to be directed to attend this dwelling and review all cracks in this location and make suggestions as to any required opening up work for clarity..."*

*13.Other potential causes could be:*

a. *How the timber frame sections have been connected to this gable return. This should be a party wall to a single leaf connection and it is entirely possible that this connection has suffered some slight movement resulting in the crack:*
b. *Minor localised settlement of the foundations at this location.*
c. *An escape of water from the adjacent rain water pipes causing softening of the ground supporting the foundations.*
d. *Other unspecified construction issues.*

*To conclude, I believe that it is impossible for any engineer to offer a firm determination on the cause of this crack, based on engineering reports to hand when considered in light of [Expert Geologist's] conclusions, without further investigations. ...My recommendation as per 12 above is warranted".*

The Provider states that it remains abundantly clear, that the concentrations of mudstone/limestone/ pyrite/gypsum at the Complainants property do not accord to the presence of pyritic heave.

(i) the Expert Geologist's 20 June 2012 Report set out that:

*"results confirmed that pyrite content to be about 0.3% and gypsum only a trace % by weight...The mudstone was weak and very weak. These findings are consistent with pyrite oxidisation and gypsum precipitation occurring or having occurred in the fill, giving it the potential to expand and cause damage...In this case little gypsum is present making it unlikely that significant expansion of the fill will have occurred..."*

/Cont'd…

(ii) the Expert Geologist's 18 March 2014 report set out that:

*"I would point out that:*

1. *The amount of pyrite present is low.*
2. *There are only traces of gypsum, which is the main expansive mineral.…*

*"I find no reason to change my assessment of the data for this property and therefore I confirm that there is insufficient evidence of the fill for me to diagnose that fill has caused the damage reported in [the Complainants'] correspondence".*

(iii) the Expert Geologist's 2 October 2014 report set out:

*"I have looked at this report and note that the amounts of total sulphur and acid soluble sulphare are low, which implies pyrite of 0.2% and gypsum of 0.5% in the whole rock. These levels of pyrite and gypsum are less than the amounts we would expect to cause serious swelling of the fill such that further testing of the fill to confirm the mineralogy, form of pyrite and the distribution of gypsum would not be justified"*

(iv) the Expert Geologist report of 24 November 2014 further set out that the amounts of pyrite and gypsum in the fill are low making it unlikely that significant expansion due to pyrite oxidation has occurred.

(v) the Expert Geologist interim 12 December 2014 report, sets out that: .

*"For expansion to have caused damage to the structure, it would be expected that gypsum would be present coating the particles and cause cracking and expansion of fill particles. Confirmation that such gypsum formed after the fill was placed and before sampling took place would also be required. The [ground investigation company] l samples were held in cool storage for about 2 weeks before being prepared for analysis. Further storage of 1 % weeks in refrigerated conditions occurred prior to chemical analysis. The [ground investigation and geotechnical company] samples were stored for less than one week. It is unlikely that significant chemical changes occurred during these periods of storage. The amounts of pyrite and gypsum in the fill are low making it unlikely that significant expansion the fill due to pyrite oxidation has occurred. It is also noted that the proportions of mudstone and argillaceous or carbonaceous limestone, which are the rock types most likely to contain pyrite, are relatively low in this fill and it contains much pure limestone, which is likely to be stable...*

*It is concluded that the amounts of pyrite and gypsum in the fill are low making it unlikely that significant expansion (sic) the fill due to pyrite oxidation has occurred".*

/Cont'd…

(vi) the Expert Geologist's 7 March 2018 letter set out to the Provider's appointed engineer:

*" …as you will see the values suggested by IS398 or Acid soluble Sulphur and Water soluble sulphur are exceeded in one of the 3 samples. This does not indicate that the material has expanded. Furthermore the sample tested was a relatively thin layer of the material selected because it was thought to be the most expansive layer present".*

(vii) On 19 March 2018 Expert Geologist informed the Provider that:

*"...based on the information provided, the fill has not caused damage to the property and therefore it is not defective... "*

**Evidence**

*Policy wording*

Definition in the Policy of Major Damage*:*

*'Any defect in the design, workmanship, materials or components of the Structure that is first discovered during either the* ***Defects Insurance Period*** *or* ***Structural Insurance Period*** *and which causes physical loss, destruction or damage and/or causes imminent instability to a New Housing Unit that requires complete or partial rebuilding or recertification work to* ***the*** *New Housing Unit****.***

*For the purposes of this Policy, the definition of* ***Major Damage*** *is deemed to include any physical loss, destruction or damage caused by contamination or pollution as consequence of a defect in the design, materials or components of the Structure of the New Housing Unit.' (Emphasis as per Policy wording)*

**The Complaints for Adjudication**

The complaint is that following the Consultant Engineer's assessment, the Provider (i) incorrectly and unreasonably suggesting that the Consultant Engineer did not independently fulfil the required evaluation of the evidence (ii) is incorrectly and unreasonably requesting a further inspection of the property by another engineer with further testing and investigations.

**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

/Cont'd…

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.

Submissions dated **15 April 2020**, **05 June 2020**, **30 June 2020**, and **27 July 2020** from the Provider, and submissions dated **24 May 2020**, **18 June 2020**, **13 July 2020**, **30 July 2020** from the Complainants, were received by this Office after the issue of the Preliminary Decision to the parties. These submissions were exchanged between the parties and an opportunity was made available to both parties for any additional observations arising from the said additional submissions. I have considered the contents of these additional submissions, and all of the submissions and evidence, for the purpose of setting my final determination below.

<u>Post Preliminary Decision submissions</u>

The Provider's submission of – 15 April 2020.

> ***"Preliminary Point of Law: Decision beyond Scope of Complaint and outside the Ombudsman's Statutory Powers***
>
> *As summarised above, the complaint is that "following the Consultant Engineer's assessment, the Provider (i) incorrectly and unreasonably suggesting that the Consultant Engineer did not independently fulfil the required evaluation of the evidence (ii) is incorrectly and unreasonably requesting a further inspection of the property by another engineer with further testing and investigations".*
>
> *It is clear that the Preliminary Decision to partially uphold the Complaint and to direct a compensatory payment to the Complainants is in fact based on [the Provider's] conduct prior to the assessment by [the Consultant Engineer] and not to the conduct which is the subject of the Complaint. The Preliminary Decision*

/Cont'd…

*therefore goes outside the scope of the Complaint and, in fact, seeks to partially uphold a complaint that has not actually been made.*

*The Ombudsman's powers in relation to complaints derive from Part 5 of the Act and, specifically, Section 60(2) which states:*

*"A complaint may be found to be upheld, substantially upheld or partially upheld only on one or more of the following grounds:*

*(i) the conduct complained of was contrary to law;*
*(ii) the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;*
*(iii) although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;*
*(iv) the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration;*
*(v) the conduct complained of was based wholly or partly on a mistake of law or fact;*
*(vi) an explanation for the conduct complained of was not given when it should have been given;*
*(vii) the conduct complained of was otherwise improper".*

*These are the only grounds on which the Ombudsman can legally uphold any complaint. Each of them requires there to be a finding in relation to "the conduct complained of". There is no power for the Ombudsman to uphold a complaint based on entirely separate conduct which is not the subject of the complaint.*

*Similarly, the power to award compensation under Section 60 (4) (d) of the Act is as follows:*
*"Where a complaint is found to be upheld, substantially upheld or partially upheld, the Ombudsman may direct the financial service provider to … pay an amount of compensation to the complainant for any loss, expense or inconvenience sustained by the complainant as a result of the conduct complained of" .*

*The Preliminary Award states: "This compensatory payment is for the incorrect and unreasonable stance taken by the Provider in not fully engaging with the appointed Consultant Engineer in the first place and in its acquiescence as regards the Complainants' control of that process, only then to dispute the Consultant Engineer's findings on the basis of that information was supplied to that engineer. This has substantially extended the already very lengthy time frame for a conclusion to this matter for the Complainants, and further greatly added to the inconvenience they have suffered".*

*It is clear, the Ombudsman having accepted that the further investigation and testing requested by PROVIDER the "cause" of loss or damage is necessary, that the*

/Cont'd…

*conduct for which the compensatory payment is to be awarded is the conduct surrounding [Consultant Engineer's] instruction which, as above, is not the subject of the Complaint. As such, the Ombudsman has no power to make that award under Section 60 (4) (b) of the Act.*

*Therefore, the Preliminary Decision is based on a serious and significant error of law and unlawfully goes beyond the scope of the Ombudsman's statutory powers under the Act. The remainder of this letter is without prejudice to that primary submission that the Preliminary Decision is entirely unlawful and invalid.*

***4. The Decision that [the Provider] is trying to suggest that the Finding made a direction to the Complainants and thus placing the blame on the Complainants for failing to implement the same***

*The Preliminary Decision contains a serious and significant error of fact in finding that [the Provider] is trying to suggest that the Finding made a direction to the Complainants and thus placing the blame on the Complainants for failing to implement the same. That finding demonstrates a failure to properly understand the submissions made in our previous correspondence on this point and a lack of proper regard to the factual background surrounding the way in which the parties sought to implement the Finding.*

*For convenience, we set out below the background to the instruction of [Consultant Engineer] as demonstrated by the correspondence previously provided to the Ombudsman with our letter of 12 August 2018:*

*07/06/2016 The Complainants wrote to the FSO seeking clarification regarding the instruction of the independent expert.*

*08/06/2016 The FSO wrote to the Complainants:*

- *clarifying what the independent engineer was to be instructed to do;*
- *confirming that they "should have access to the previous Engineer reports and that these reports together with newly appointed engineers independent review will form the basis of any final determination"; and*
- *commenting on how the independent engineer should be selected, stating " … to ensure fairness in the process I would expect that the Company would write to Engineers of Ireland with a copy of this letter (copying you on same) and ask them to provide a list of three Engineers. On receipt of the Engineers of Ireland's selections … you would be asked by the Company to select an Engineer from that list. Thereafter, it is that selected Engineer that the Company is to engage, so as to seek an opinion on the above 3 issues".*

*23/06/2016 - In accordance with that direction, [the Provider] emailed Engineers of Ireland seeking the nomination of 3 engineers, and copied that email to the Complainants.*

/Cont'd…

*26/06/2016 - The Complainants wrote to the FSO agreeing to facilitate an independent engineer's review and stating, inter alia:*

*"The Insurance group outline in their recent correspondence, that it appears that we would not object to [the Provider] being involved in the appointment of the independent engineer. For the record, we would like to clarify that we have a huge objection to [the Provider] being in any way involved in the process. I have no confidence in their ethics or conduct. Personally, I do not see any reason why the Insurance group should have any involvement in choosing an* ***Independent*** *Engineer other than to try and unfairly influence and confuse…*

*We are dismayed with [the Provider's] behaviour and find their latest suggestion of an additional monitoring period and for them to be also involved in the selection of an independent Engineer completely unacceptable.*

*… I suggest that when Engineers of Ireland present their list of three Engineers, we will liaise with the Insurance group to check if they have any* ***legitimate*** *objection to any of the three selected Engineers. If they have a* ***legitimate*** *objection, we will review their objection and take this on board before selecting an Engineer. If not, we will select one of the Independent Engineers and proceed with the Ombudsman' remit to see if an alternative proximate cause can explain the previously reported damage".*

*27/06/2016 Engineers of Ireland provided [the Provider] with a list of registered engineers, but advised that they were not in a position to nominate 3.*

*28/06/2016 The FSO wrote to [the Provider] stating "If the parties cannot agree on an engineer, I propose that the parties meet to select by way of a lottery an engineer from the list of names on the Engineers Ireland Pyrite (Building Condition Assessment) Register ... Of course, as the parties appear to understand, the Insurance Company would be involved in the appointment and the instruction of the selected Engineer".*

*That letter also stated: "I accept that matters have been made more difficult by the Complainant having the property redecorated, but that should not prevent the new engineer from giving an opinion as to the any [sic] damage to the property, based on an inspection of the property and based on all the evidence previously submitted. The redecoration should not prevent the new engineer from suggesting that further testing take place, or indeed, that the advocated monitoring of the re-decorated property should take place. Such matters would of course be for the new engineer to suggest and if suggested are to be followed through, with the Company covering the costs."*

*28/06/2016 The Complainants sent an email to [the Provider] in which they said:*

*"[The Provider] in their recent correspondence seem to suggest that they will have some involvement in the choosing of an independent Engineer.*

/Cont'd…

*For the record, we would clarify that we have a huge objection to [the Provider] being any way involved in the process. I have no confidence in their ethics or conduct and furthermore, the Ombudsman recently upheld our complaint in relation to their unacceptable behaviour. Therefore, we will not agree to the Insurance group having any involvement in choosing an Independent Engineer. In our opinion the only reason they would want to be involved would be to unfairly influence and confuse…*

*Therefore, the only acceptable solution to us is, that the [the Provider] send us a list of any Engineers to which they have a* ***legitimate*** *objection to. If they have a legitimate objection we will review their objection and take this on board before selecting an Engineer. If not, we will review their objection and take this on board before selecting an Engineer. If not, we will select an independent Engineer and proceed with the Ombudsman' remit to see if an alternative proximate cause can explain the previously reported damage to our house"*

*11/07/2016 [The Provider] issued the names of 5 engineers from the list provided by Engineers of Ireland to [the Provider] to pass to the Complainants in order that they could select one.*

*23/08/2016 The Complainants issued direct instructions to [the Consultant Engineer] without any knowledge, or prior discussion with [the Provider's] representative. [The Provider] was not copied in with those instructions and was not informed by the Complainants that they had been issued. In fact, the Complainant has, to date, refused to provide [the Provider] with a copy of the instructions despite numerous requests for same, which is in clear breach of the Claims Procedure applicable to their Policy.*

*06/10/2016 [The Provider] wrote to the Complainants setting out details of the inspection that they proposed to carry out at the Property.*

*10/10/2016 The Complainants emailed a copy of the [Consultant Engineer's] proposal to [the Provider] …. This was [the Provider's] first awareness that the Complainants had issued direct instructions to [the Consultant Engineer] without [the Provider's] knowledge or involvement.*

*20/10/2016 [The Provider] emailed the Complainants confirming its agreement to the proposed investigations, requesting additional investigation regarding the cracked floor tiling and confirming that it would cover the [the Consultant Engineer's] costs, including any further investigations they recommended.*

*07/11/2016 [The Consultant Engineer] inspected the Property without being provided with the opinion of [the Expert Geologist] an independent and world renowned expert in pyritic expansion, following his review of geological material excavated from the Property.*

/Cont'd…

*28/11/2016 The Complainants informed [the Provider] by email that [the Consultant Engineer] had carried out their inspection.*

*04/04/2017 [The Consultant Engineer] provided their report.*

*Put in context, that background cannot properly be said to support a finding that [the Provider] considered that there had been a direction to the Complainants to undertake the instruction of the expert. [The Provider] was at all times seeking to implement the Finding in the face of intense objection by the Complainants, who refused to agree to [the Provider] being involved in the process. The matter was referred back to the FSO repeatedly by the parties, seeking direction and guidance on how to address the Complainants' concerns. There is nothing in those contemporaneous documents from which it can properly or reasonably be concluded that [the Provider] considered that the Finding made a direction to the Complainants.*

*[The Provider] in fact dutifully followed the directions received from the FSO and sought to cooperate with the Complainants up to the point of providing the names of the suggested experts to the Complainants on 11 July 2016 in order for them to make a selection. There was never any suggestion or intention by [the Provider] that the Complainants would be responsible for instructing the expert; the expectation was that the Complainants would notify [the Provider] of their selection so that [the Provider] could arrange the expert instruction. It was only after the Complainants had unilaterally appointed [the Consultant Engineer] that [the Provider] became aware that this had taken place.*

*The Preliminary Decision refers in support of its finding in relation to this point to the four statements made in our letter of 19 July 2019. Those statements do not, however, justify the finding made when read in the context of the specific questions to which they are responding and the factual background set out above.*

*The statements relied on by the Ombudsman are as follows:*

*(i) Insurers therefore understandably assumed the Complainants had complied with the FSPO's instructions and provided "all the evidence" when unilaterally appointing [Consultant Engineer] on 23 August 2016".*

*This statement was in response to the Ombudsman's question: "To what extent did the Provider communicate with the appointed engineer from the outset, particularly with regard to what items of evidence it wanted the engineer to consider when preparing his report? I would refer you back to the Ombudsman's letter of 28 June 2016 regarding the information that was to be considered by the engineer".*

*[The Provider's] response to this, which is quoted in part only in the Preliminary Decision, was "As set out at 1 above, given the FSPO's specific instruction that "…. an opinion as to … any [sic] damage to the property, based on the inspection of the property and based on **all** the evidence previously submitted" it was the*

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*understanding of Insurers that the Complainants had provided [Consultant Engineer] with a full suite of the engineering reports (being reports relevant to both the Complainants and Insurers) necessary to complete the FSPO directed independent review. Insurers therefore understandably assumed the Complainants had complied with the FSPO's instructions and provide "all the evidence" when unilaterally appointing [the Consultant Engineer] on 23 August 2016".*

*This does not amount to a suggestion that the Finding made any direction to the Complainant. It simply explains, in response to the specific question asked, why [the Provider] did not communicate with [Consultant Engineer] regarding the information that the FSO had stated in the 28 June 2016 letter was to be considered. The comment referred to explains why [the Provider], on discovering after the event that the Complainants had chosen to instruct [Consultant Engineer] unilaterally, did not see any reason to provide documents to [Consultant Engineer] since it understood that the Complainants would act in good faith and provide them with all the evidence previously submitted, which would amount to compliance with the direction given in the FSO's letter of 28 June 2016, specifically with their reference to "cause".*

*(ii) "It was assumed that the complainants had complied with this FSPO Direction".*

*This comment was in response to the Ombudsman's question: "Did the Provider or its agents /specialists interact with the appointed engineer in relation to site visits, contents of reports etc? If not, why not? If yes, who interacted with the appointed engineer and in relation to what matters?"*

*The full response stated "The scope of the investigations [Consultant Engineer] proposed to undertake were detailed in their attached letter of 6 October 2016. However, given the FSPO's ruling that "all" the evidence in relation to this claim should be considered by the engineer, it was assumed that the Complainants had complied with this Direction, which Insurers later discovered to be incorrect".*

*Again, this explains why [the Provider] did not consider it to be necessary for it to interact with [Consultant Engineer] based on its understanding that the instructions provided by the Complainants had followed the direction given in the FSO's letter of 28 June 2016. It does not suggest that the Finding made any direction to the Complainant. It cannot properly be read as a suggestion that there was any obligation on the Complainants to instruct the expert. However, the complainants having refused to allow [the Provider] to have conduct of the instruction and having chosen to issue the instructions themselves, it was reasonable to expect them to act in good faith and follow the specific direction that they themselves had sought in correspondence with the FSO regarding the scope of the instruction and the evidence to be provided to the expert.*

*(iii) "… the Complainants failed to comply with the FSPO Decision of 20 May 2016"; and*

/Cont'd…

*(iv) …it can only be concluded that the FSPO's 20 May direction that an "independent third party engineer" be appointed to inspect and report on the property has not yet been complied with".*

*These statements were both made in response to the question "Is the Provider satisfied that it has complied with the Ombudsman's directions set out in the Decision dated 20th May 2016, if yes please outline how it has done so? If not, why not, or what prevented it from complying with the Ombudsman's directions?"*

*The response stated "The Provider is satisfied that it has complied with the FSPO Decision of 20 May 2016 as, inter alia, it took steps to follow the FSPO decision in paying for an independent engineer to report on the alleged damage to the Complainant's premises. However, it is Insurers' position that the Complainants failed to comply with the FSPO Decision of 20 May 2016".*

*The letter goes on to explain why could [Consultant Engineer] not be considered to be a truly independent expert, given that they considered themselves to be instructed by one party only and in light of the Complainants' instruction to them not to respond to [the Provider's] legitimate queries.*

*The statements therefore correctly state that the Complainants have not complied with the Finding by frustrating the direction that the expert should be independent and why, therefore, this further complaint is premature. It does not suggest that the Finding imposed any obligation on the Complainants in relation to the instruction of the expert. However, against the factual background set out above, where:*

*a. the Complainants unilaterally chose to take the lead in instructing the expert; and b. the FSO was aware of the Complainants' intentions from their correspondence of 26 and 28 June 2018, stating "we will select an independent Engineers and proceed with the Ombudsman' remit …" it is reasonable for [the Provider] to expect that they would have acted in good faith and done so in accordance with the directions, including those made in the Finding itself, specifically in relation to the identification of "cause" of loss or damage, being the insured peril and trigger point of the Policy, as well as in the further FSO correspondence of June 2016.*

*In light of the above, we submit that the Ombudsman's finding that the above conduct constituted unreasonable and improper behaviour on behalf of [the Provider] sufficient to justify the engagement of s60(2)(b),(c) and (g) of the Act makes serious and significant errors of fact and law in that it:*

*(i) fails to give due regard to [the Provider's] response to the Ombudsman's questions dated 19 July 2019;*
*(ii) fails to give due consideration to the context and the conduct of the Complainants; and*
*(iii) reaches a conclusion which is not justified on the evidence before the Ombudsman.*

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***4. The Decision that [the Provider] unreasonably failed to ensure that the directions made in the Finding were correctly implemented by:***

***a. allowing the Complainants' to have control of the instruction of [Consultant Engineer]; and***
***b. failing to engage with the instruction of [Consultant Engineer] in relation to the documents that it was to receive and / or the tests to be carried out.***

*The Preliminary Decision makes serious errors of fact and law in that it fails to properly understand the underlying facts surrounding the instruction of [Consultant Engineer] and reaches an inequitable conclusion which no reasonable Ombudsman could have made on the basis of those facts.*

*The finding fails to take account properly or at all of the factual background set out above. In particular:*

*a. as far as the control of the instruction of  is concerned:*

*(i) It is clear from the chronology set out above, and the correspondence provided to the Ombudsman with our letter of 12 August 2019, that [the Provider] took all reasonable steps in relation to the instruction of [Consultant Engineer] but the Complainants refused to allow [the Provider] to make the appointment and took matters out of its hands when issuing their unilateral instruction on 23 August 2016.*

*(ii) [The Provider] did not in fact know that the Complainants had unilaterally instructed [Consultant Engineer] on 23 August 2016. It only became aware of this on receipt of a copy of [Consultant Engineer's] letter of 6 October 2016 which, as above, was sent to [the Provider] by the Complainants on 10 October 2016 (i.e. around 6 weeks after the instructions were issued). There was, therefore, no opportunity for [the Provider] to be involved in the instruction of [Consultant Engineer] and the finding that it unreasonably allowed the Complainants to have control of the instruction is, therefore, factually incorrect.*

*(iii) The Preliminary Decision also fails to have regard to the Complainants' extreme objection to [the Provider] having any involvement in the instruction of the expert. Their correspondence of 26 and 28 June 2016 could not have been clearer in that regard: "… we would like to clarify that we have a huge objection to [the Provider] being in any way involved in the process" and "we will select one of the Independent Engineers and proceed with the Ombudsman' remit to see if an alternative proximate cause can explain the previously reported damage". In these circumstances, the approach taken by the [the Provider] was the only reasonable, practical and proportionate response to progress matters in the light of the Complainants' extreme objections.*

*(iv) Further, the FSO had that correspondence and did not object to the Complainants' proposals. It therefore clearly considered it to be appropriate and,*

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*insofar as [the Provider] can be said to have acquiesced in the same, the FSO also did so at the relevant time. In the circumstances, it is not open to the Ombudsman to hold that [the Provider] acquiescence in the same was unreasonable.*

*(v) As above, the Complainants had corresponded with the FSO regarding the scope of the engineer's instruction and the documents to be provided to him and, therefore, it was reasonable for [the Provider] to trust the Complainants to act in good faith and follow the directions given to them by the FSO to provide [Consultant Engineer] with copies of "all the evidence previously submitted" in line with the 28 June 2016 FSO letter in order to identify the "cause" of loss or damage.*

*(vi) The finding that [the Provider] unreasonably allowed the Complainants to have control of the instruction of [Consultant Engineer] is, therefore, factually incorrect, unreasonable and irrational.*

*b. As for the failure to engage with [Consultant Engineer] regarding the documents they were to receive and the tests to be carried out:*

*(i) Given the circumstances in which [Consultant Engineer] were instructed, [the Provider] had no opportunity to have any input regarding the documents provided to them before the Complainants issued their instructions on 23 August 2016.*

*(ii) [The Provider] did not receive a copy of the instructions and/or enclosures and, therefore, had no way of knowing at the time that there had been any failure to provide all documentation required pursuant to the FSO's clear guidance in its letters of 8 and 28 June 2016.*

*(iii) In light of that clear guidance, it was reasonable for [the Provider] to believe that the Complainants would abide by the doctrine of utmost good faith and would have provided [Consultant Engineer] with all the evidence previously submitted, including [Expert Geologist] opinions upon the make-up of infill used in the construction of the Property, which [the Provider] has clearly demonstrated to the Ombudsman was never provided by the Complainants to [Consultant Engineer] despite being in their possession.*

*(iv) In the circumstances, on becoming aware of [Consultant Engineer's] instruction, given the FSO's clear advice within the Finding to both parties that [the Provider] was entitled to question the actual cause of loss, and the further advice of 8 June 2016, to both parties, that the Engineer "should have access to the previous Engineer reports and that these reports together with newly appointed engineers independent review will form the basis of any final determination" and confirmation of 28 June 2016 that the Engineer's review was to be "based on all the evidence previously submitted" there was no reasonable need for [the Provider] to question the completeness of the documentation provided to them by the Complainant.*

*(v) As far as tests are concerned, it was not for [the Provider] to direct the independent expert in relation to those tests. As stated in the FSO letter of 28 June*

/Cont'd…

*2016, " The re-decoration should not prevent the new engineer from suggesting that further testing take place, or indeed, that the advocated monitoring of the re-decorated property should take place. Such matters would of course be for the new engineer to suggest and if suggested are to be followed through, with the Company covering the costs". The [above] words make it clear that the view of the FSO was that it was for the independent expert, and not [the Provider], to determine what tests were to be conducted.*

*In any event, it is not correct that [the Provider] failed to engage with [Consultant Engineer] in relation to the testing. Once in receipt of [Consultant Engineer's] 6 October 2016 letter relating to the proposed testing, [the Provider] responded on 20 October 2016 as follows: I referred your email to our advisers who have the following comments which I am providing you with in the interests of transparency. "The Company has accepted that it will cover the costs of the independent engineer and if the engineer recommends further testing, that it will also cover the cost of same. This relates to the additional testing to be done by [Consultant Engineer], the third party engineers, to try to determine the proximate cause of the damage in this dwelling. The investigations are not in my opinion restricted to pyritic heave causes but can also include any other possible insured peril. [Consultant Engineer] are now proposing to remove the timber floor covering in the hall and the living room to inspect the underlying concrete floor slab. They also want to examine the threshold of the floor tiling in the kitchen. In my opinion this would be reasonably called additional investigations and whilst not normal for pyritic heave investigations will give a higher level of clarity in respect of any current floor heave. The removal of some of the floor tiles at the door threshold will also clearly show if any vertical displacement has occurred at this location or whether the cracking is simply down to a lack of a movement joint as would be required under the applicable standard. I would therefore suggest that we do not object to the proposed additional investigations but highlight that we would like consideration of the cracked floor tiling in accordance with the British Standard BS5385. So, on the basis of the above, we do not object to the proposed investigations". This clearly shows that [the Provider] did in fact engage with [Consultant Engineer] in relation to what they considered to be investigations to be carried out in addition to their review of all the relevant evidence, including [Expert Geologist's] opinion.*

*(vi) The Preliminary Decision therefore makes a serious error of fact in finding that [the Provider] unreasonably failed to engage with [Consultant Engineer] in relation to the inspections to be carried out.*

*(vii) The Preliminary Decision also fails to have regard to the subsequent events when [the Provider] tried to engage with [Consultant Engineer] following receipt of the 4 April 2017 report. In particular:*

*i. On 6 July 2017, ([the Provider's] agents) sent [Consultant Engineer] a list of questions which [the Provider] requested that [Consultant Engineer] consider and*

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*requested further investigation regarding the cracking present at the top right hand side of the rear elevation at the top of the patio door.*

*ii. [The Provider's agent] chased [Consultant Engineer] for a response to that letter on 21 July 2017.*

*iii. On 15 August 2017, [the Provider's agent] chased again and [Consultant Engineer] replied, stating: "My client had instructed me not to respond".*

*This correspondence demonstrates [the Provider's] attempts, at an early stage, to engage with [Consultant Engineer] regarding the contents of the 4 April 2017 report and the further investigations needed, which were frustrated by the Complainants' instructions to [Consultant Engineer]. The position taken by the Complainants at that stage was consistent with their previously stated objection to [the Provider] having any involvement in the instruction of [Consultant Engineer]. The Preliminary Decision fails to give proper consideration to that correspondence which, when considered against the evidence surrounding [Consultant Engineer's] instruction, confirms that it was not possible for [the Provider] to direct the inspections and investigations to be carried out by [Consultant Engineer].*

*The Preliminary Decision also contains a serious error of fact in finding that [the Provider] has admitted failing to implement the Finding. No such admission has been made by [the Provider]. On the contrary, as set out above, our letter of 12 August 2016 states "The Provider is satisfied that it has complied with the FSPO Decision of 20 May 2016 as, inter alia, it took steps to follow the FSPO decision in paying for an independent engineer report on the alleged damage to the Complainants' Premises". This is a further serious error of fact in the Preliminary Decision.*

*In light of the above, we submit that the Ombudsman's findings that [the Provider's] conduct in relation to the instruction of and engagement with [Consultant Engineer was unreasonable and improper such as to justify the engagement of s60(2)(b), (c) and (g) of the Act makes serious and significant errors of fact and law in that it fails to give proper regard to the underlying facts surrounding the instruction of and liaison with [Consultant Engineer] and reaches an inequitable conclusion which no reasonable Ombudsman could have made on the basis of those facts.*

***5. The Decision that the Complainants Bear No Responsibility for the Implementation of the Finding***

*It appears from the Analysis section of the Preliminary Decision that this part of the Decision is based on the Ombudsman's erroneous finding that [the Provider] seeks to suggest that the Finding made a direction to the Complainants (addressed above). In doing so, it fails to give proper regard to the evidence before the*

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*Ombudsman regarding the factual background pertaining to [Consultant Engineer's] instruction. As explained above, as a matter of fact:*

*(i) The Complainants, unknown to and without the prior agreement of [the Provider], chose to instruct [Consultant Engineer] unilaterally on 23 August 2016 and did not inform [the Provider] that it had done so.*

*(ii) Prior to issuing those instructions, the Complainants had received clear guidance from the FSPO that the engineer was to give an opinion "based on all the evidence previously submitted". They were, therefore, aware of the need to provide [Consultant Engineer] with the totality of the evidence, including the [Expert Geologist's] advices.*

*(iii) The Complainants however failed to include those advices in the documentation furnished to [Consultant Engineer] with their instructions.*

*(iv) The Complainants have not provided any explanation of their failure to do so. As far as that is concerned:*

*a. In the Complaint, they state "[Consultant Engineer] did an extensive review of all available case information". That statement is incorrect given that they were aware [Consultant Engineer] were not provided with the [Expert Geologist's] advice.*

*b. The Complainants' letter to the Ombudsman dated 14 May 2018 stated: "...we are surprised by their suggestion that the opinions provided by [Expert Geologist] may have been omitted by us. At all times, we have acted with full transparency in this case…. For their reference, all opinions by [Expert Geologist] as noted in the 'FSO finding report' (dated 20/05/2016) were provided to [Consultant Engineer] on 23rd August 2016. This includes the opinions as detailed within the letters as well as additional opinions e.g. 02 October 2014".*

*That statement is inaccurate or, at least, misleading in suggesting that the [Expert Geologist's] advices were provided to [Consultant Engineer] when in fact, as we now know, they were not.*

*c. On 24 May 2018, in an email to this firm, the Complainants confirmed for the first time that the [Expert Geologist's ] reports were not in fact provided to [Consultant Engineer], stating "We did not have soft copies of all [Expert Geologist's] reports, however, as already outlined, the May 2016 FSO report (which included the opinions of [Expert Geologist] was provided to [Consultant Engineer] on 23 August 2016".*

*As we have previously demonstrated, the assertion that the Complainants did not have soft copies of the [Expert Geologist's] advices was entirely incorrect.*

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*d. In their final submissions to the Ombudsman dated 12 June 2018, the Complainants appear to be suggesting that they considered it was unnecessary for the [Expert Geologist's] advices to be supplied to [Consultant Engineer] for reasons which are not entirely clear from those submissions.*

*(v) Following receipt of the [Consultant Engineer] report, [the Provider] promptly raised questions on the findings contained in it and suggested further investigations. The Complainants instructed [Consultant Engineer] not to respond to [the Provider's] reasonable questions and refused to agree to any further investigations. In doing so, it is their own actions that have prevented the investigation progressing to enable [the Provider] to reach a decision on their claim.*

*The decision that the Complainants bear no responsibility for the way in which the Finding has been implemented is, therefore, unsustainable on the facts and amounts to a serious and significant error of fact and law.*

***6. The Decision regarding [Consultant Engineer's] Independence***

*The Preliminary Decision accepts that a further review is required to bring matters to a conclusion but rejects [the Provider's] request that this be carried out by a newly instructed independent expert, stating "While the Provider has expressed that a newly appointed expert should re-do an inspection and report, I consider that the existing appointed expert should now be requested by the Provider to complete the task having regard to all the reports and advices received from all the experts. I am satisfied that the consultant Engineer cannot be held in any way at fault for lack of engagement by the Provider or coordination between the parties as to what was required from him".*

*The Decision however fails to address the concerns raised in [the Provider's] submissions regarding [Consultant Engineer] independence. Those submissions were not based on any suggested fault on the part of [Consultant Engineer] in relation to the documents and/or instructions that they received. However, it is clear from [Consultant Engineer's] email to [the Provider's agent] dated 15 April 2017 stating: "my client had instructed me not to respond" that, notwithstanding the Complainants' assertion that [Consultant Engineer] were aware, having been provided with the Finding, that their role was to be that of an independent expert, they in fact considered themselves to be acting as the Complainants' expert in this matter.*

*Further, [Consultant Engineer] confirmed in their letter of 8 June 2018 that: "… No copies of the [Expert Geologist's] advices ….were provided for review. A copy of the Ombudsman's reports of 8th June…., Ombudsman report dated 28.06.2016 and ombudsman finding were provided but did not form part of the engineering review".*

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*This correspondence demonstrates that [Consultant Engineer]:*
*(i) knew that the Ombudsman had directed that an independent expert was to be instructed to provide an opinion;*
*(ii) was aware of the existence of the [Expert Geologist's] advices, which were referred to in the Finding;*
*(iii) had received copy of the FSO correspondence of 8 and 28 June 2016, which made it clear that they were to be provided with copies of all the evidence; and*
*(iv) failed to call for copies of the [Expert Geologist's] advices when, having represented countless other [Provider] Policyholders and therefore being very familiar with the [the Provider] Guidance Protocols, [Consultant Engineer] must have known the assessment of the cause of damage under the Policy, as directed by the FSO, would have involved an independent geological assessment of the stone infill which was not included in the documentation they had received.*

*This failure by [Consultant Engineer], together with their confirmation that they did not include the Finding, which had been provided to them, as part of their review, casts serious doubt on their ability to perform their function as a wholly independent expert.*

*The Preliminary Decision, in dismissing [the Provider's] concerns on this issue and proposing directions for further investigations to be carried out by [Consultant Engineer], makes a serious error of fact and law in that it:*
*(i) fails to give any reasons for the decision;*
*(ii) fails to accord any or any proper weight to the evidence before it; and*
*(iii) reaches a decision which no reasonable decision maker could reach on the basis of the evidence.*

***7. The Compensatory Payment***

*As noted above, the Preliminary Decision in this regard states:*
*"Given the unreasonable conduct of the Provider since the Direction was given by the Financial Services Ombudsman in 2016 and the additional considerable inconvenience this has caused to the Complainants, I further intend to direct a compensatory payment of €25,000 (twenty five thousand euro) be paid to the Complainants. This compensatory payment is for the incorrect and unreasonable stance taken by the Provider in not fully engaging with the appointed Consultant Engineer in the first place and in its acquiescence as regards the Complainants' control of that process, only then to dispute the Consultant Engineer's findings on the basis of that information was supplied to that engineer. This has substantially extended the already very lengthy time frame for a conclusion to this matter for the Complainants, and further greatly added to the inconvenience they have suffered".*

*The Preliminary Decision gives no explanation of how the award of €25,000 has been calculated, save that it is purportedly to reflect the extent to which [the Provider's] alleged unreasonable conduct in relation to the way in which [Consultant Engineer] was instructed "has substantially extended the already very*

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*lengthy time frame for a conclusion to this matter for the Complainants, and further greatly added to the inconvenience they have suffered".*

*In making that decision, the Ombudsman has failed to have any or any proper regard to [the Provider's] considerable efforts to progress this matter by trying to engage with the Complainants and/or [Consultant Engineer] following receipt of the 4 April 2017 report and the fact that it was the Complainants' own refusal to agree to allow any further investigations to take place. Given that the Ombudsman has agreed that the investigations requested by [the Provider] are required, it is illogical and irrational to award compensation to the Complainants for the delay to those investigations that was caused not by [the Provider's] conduct but by their own refusal to allow the investigations to proceed.*

*Further, the Decision contains no information as to how the Ombudsman has determined the level of compensation of €25,000. This is purportedly in relation to the inconvenience suffered by the Complainants due to the delay in the matter reaching conclusion. However, no details have been given of the nature of that inconvenience. It appears, rather, that the Ombudsman's award is based primarily on his views as to the unreasonableness of [the Provider's] conduct in this matter. To that extent, the decision unlawfully exceeds the Ombudsman's power under Section 60 (4) (d) of the Act to award compensation "for any loss, expense or inconvenience sustained by the complainant as a result of the conduct complained of". Accordingly, a compensatory award can only be made in respect of the Complainants actual "loss, expense or inconvenience sustained as a result of the conduct complained of" and the conduct of [the Provider] can have no part to play in setting the level of the award.*

*For the reasons above, the Preliminary Decision contains no proper grounds to justify a compensatory an award of €25,000, or indeed of any amount, for inconvenience and, as such, the Decision in relation to the compensatory award amounts to a serious and significant error of law.*

***8. Conclusion***

*For the reasons set out above, the Preliminary Decision:*
*(i) unlawfully makes findings and awards compensation it has no statutory power to make and / or award under the Act;*
*(ii) makes numerous serious and significant errors of fact and law;*
*(iii) fails to take any or any proper account of the evidence before the Ombudsman;*
*(iv) makes inequitable findings which no reasonable ombudsman could make based on the evidence before him;*
*(v) fails to give any or any proper weight to the submissions made by [the Provider] in response to the Complaint;*
*(vi) fails to address the issue of [Consultant Engineer's] independence and / or to give reasons for the decision to order that the further investigations be carried out by [Consultant Engineer] rather than a newly instructed independent expert; and*
*(vii) makes a compensatory award which is unlawful, unjustified and excessive.*

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*Such a Decision being outside the Ombudsman's statutory powers, inadequately explained and not reasonably based on the evidence before the Ombudsman amounts to a failure to follow fair and equitable procedures and is unlawful".*

18 June 2020 - The Complainants' submission

*"This letter is in response to the Insurance Provider's letter of 05 June 2020. We have responded to the matters raised by the Insurance Provider, and have drafted our responses relative to the current complaint:*

1. ***Complaint 1: Incorrectly and unreasonably suggesting that [the Consultant Engineer] did not independently fulfil the mandate directed by the Ombudsman***
   - ***Level of Engagement***
   - ***Unilateral instruction claim***
   - ***Omission of [Expert Geologist's] opinion claim***
   - ***Independent Engineer didn't act in an independent capacity claim***
   - ***Communication Protocol***

2. ***Complaint 2: Incorrectly and unreasonably requesting further inspection by another engineer with further testing and investigation on the property***
   - ***Our conduct and objection to further non-specific testing and investigation***
   - ***The nature of inconvenience & Prior Conduct***

*In support of simplicity, and not to get distracted from ambiguity created by the Insurance Provider, we would like to take the opportunity to re-clarify the status of our open claim when the Ombudsman issued their Finding in May 2016:*

- *Geological reports support the fact that our house **is** built with an infill defect 'pyrite' in which chemical reactions have taken place*
- *Our original Engineers confirms that our house also has damage consistent with pyrite damage - (see table below), and also confirms that the damage is in accordance with the definition of 'Major Damage' as defined in our policy*
- *In response to our complaint regarding the Insurance Provider's rejection of the claim, the Ombudsman issued a Finding in May 2016:*
  - *The Ombudsman formally noted that effective March 2012, the burden of identifying an alternative cause of damage to our home, if not pyrite, is the responsibility of the Insurance Provider.*
  - *The Ombudsman's finding also recommended the appointment of an Independent Engineer to carry out the following remit:*
    - *Determine whether in his opinion the reported damage to our house is most likely caused by another proximate cause other than pyrite?*
    - *Determine whether in his opinion 'Major Damage' has been satisfied in accordance with the wording of our policy document?*

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- *Determine whether in his opinion, our property contains damage in the fabric which is (most likely) due to pyrite heave?*

- *The Independent Engineer has delivered on the Ombudsman mandate. He confirms that our house has damage consistent with pyrite damage (see table below), and also confirms that the damage is in accordance with the definition of 'Major Damage' as defined in our policy.*

- *The Insurance Provider has not delivered on the Ombudsman's mandate of May 2016 which placed the onus on them effective May 2012 to identify an alternative cause of damage if not pyrite – while the Insurance Provider attempts to discount the Independent Engineer's conclusion, they have <u>never</u> in the 8 year period provided an alternative proximate.* (the Complainants' emphasis)

| ***Source of Factual Evidence*** | ***Pyrite-related damage*** | ***Pyrite-related damage*** |
|---|---|---|
| *... (Original Engineer)* | ✓ | |
| *... (Insurance Provider's retained expert)* | | ✓ |
| *...(Independent Engineer)* | ✓ | |

*For everyone's sake, the Insurance Provider needs to be less focused on unfairly attempting to find loopholes, and create ambiguity & confusion. They are getting hung up on matters that are not relevant to the core facts of the case and related evidence. Therefore, they should do the 'right thing' and simply focus on the matter in hand i.e. give merit to the factual evidence in support of pyrite presence and related damage, and allow this case progress to closure once and for all.*

1. ***Complaint 1: Incorrectly and unreasonably suggesting that [the Consultant Engineer] did not independently fulfil the mandate directed by the Ombudsman***

    - ***Level of Engagement***

*It is difficult to read the Insurance Providers most recent response where they mention that as part of their documented sequence of events, they did 'not deliberately suppress', that certain 'statements were not deemed material or significant' etc. This selective, cherry-picking approach is what we have had to endure over the last 8 years where communications from the Insurance Provider are drafted in an attempt to influence the reader 'one-way', and imply that we fell-short. This approach by the Insurance Provider is extremely unprofessional and unethical.*

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*It is therefore of no surprise to read that they overlooked the correspondence of 4 August 2016. And yes, while this correspondence was with another potential engineer, it clearly outlined the text we proposed providing to the 5 short-listed engineers, which we have outlined on numerous occasions, was merely an extract of the Ombudsman mandate of May 2016. It is important to note that the Insurance Provider raised no concerns with this text at the time.*

The Complainants refers to a copy of the email issued to the Independent Engineer and continue:

*Similarly, on 23 August, the Insurance Provider enquired 'Can we clarify that [the First Complainant] will attach all the FSO letters so that the Engineer knows what is expected?' Therefore, it is clear that the Insurance Provider expected us to facilitate the correspondence and inspection review with one of the 5 short-listed engineers. On the back of this email from the Insurance Provider, we duly provided the FSO letters to the Independent Engineer on 23 August.*

*Therefore, there was nothing improper with our email correspondence with any of the potential engineers up to or including 23 August.*

*In September & October 2016, the Insurance Provider was also kept informed of the Engineers proposal, and their correspondence at this time clearly demonstrates that they were well-versed. They <u>now</u> state they 'had no reason to intervene' when [the Consultant Engineer] issued their written proposals in October 2016 as they had 'assumed' that all documentation was furnished. We dispute this, because it is evident that there was nothing preventing them to actively engage or influence the investigation at the time. Given they were unable to clarify the non-specific testing that they requested 1 year later, we would strongly doubt that they would have in fact influenced the investigations at the time!*

*Therefore, the Insurance Provider should not unfairly interpret their own lack of engagement as an indication that we had 'control' over the process. Instead, the Insurance Provider needs to accept responsibility for their own shortcomings and lack of engagement (as supported by the Ombudsman finding of March 2020)! Why should we as the customer be left to suffer the consequences of the their own shortcomings and endure further prolonging of this case!*

- ***Unilateral instruction claim***

*As stated before and as acknowledged by the Insurance Provider, we were not tasked with providing any documentation to [the Consultant Engineer]. However, as prompted by the Insurance Provider on 23 August, we proactively furnished the documentation, with good intent that the Independent Engineer would have a good synopsis of the case. This documentation included the Ombudsman summary file (an independent file summarising the case on behalf of both parties), the FSO*

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*letters, the Final response from the Insurance Provider (including the final response from the Provider's engineer …, all of which referenced the 'opinions' of [Expert Geologist], and indeed other reports/sources.*

*The Insurance Provider's term 'instructed' implies there were detailed, step-by-step instructions provided by us. It is very disappointing that we have to repeat our formal position on this matter, but once again and for the record, we did not issue an 'instruction' but merely forwarded the Ombudsman mandate of May 2016, and the documentation as described above.*

*The Insurance Provider needs to **STOP** labelling this as a unilateral 'instruction' by us!*

- ***Omission of [Expert Geologist] opinion claim***

*The Insurance Provider's statement that we furnished 'incomplete' information is a total exaggeration! There can be no argument that [the Consultant Engineer] was not fully aware of all geological reports relevant to this case, including the opinions of [Expert Geologist], as they were all referenced in the documentation mentioned above.*

*If the Independent Engineer felt the need for additional reports/opinions (inc. those of [Expert Geologist] or indeed others), he would have requested them. He did not, and was well positioned to conclude that damage to our home is pyrite related – the Insurance Provider should accept this conclusion on its own merits without making unfounded and unconvincing statements regarding the documentation furnished.*

*The Insurance Provider's letter also suggests that [Expert Geologist] identified our infill as 'different'. Regardless of whether it is deemed 'different' (whatever that means), let us not lose sight of the fact that [Expert Geologist] did in fact confirm the existence of pyrite in which reactions had taken place (as did indeed the 3 geologist reports). He also confirmed that the level of pyrite in our fill had the potential to expand and cause damage. Given, there is no dispute regarding the presence of pyrite, the next step part of the claim process is to confirm that the damage to our house is indeed pyrite-related. This was the mandate assigned to the engineers, which they have duly <u>delivered on</u> based on their physical and visual inspections.* (Complainants' emphasis)

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*Therefore, and as detailed in our letter of May 2020, we would, question the materiality of the Insurance Providers claim that this 'opinion' was omitted. Their claim does not have a direct bearing or influence on the fact that pyrite **is** present in our ground fill.*

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*To suggest that we intentionally omitted an 'opinion' is merely an excuse by the Insurance Provider to deflect from their noncompliance of the Ombudsman's 2016 finding which identified that the onus is on the Insurance Provider themselves, effective March 2012, to identify an alternative proximate cause if not pyrite.*

*Therefore, instead of hanging on to this lame 'opinion' argument , the Insurance Provider needs to acknowledge that the presence of pyrite that can cause damage has already been confirmed, and now accept that there are 2 over 1 Engineer conclusions in support of pyrite related damage (see table above).*

- ***Independent Engineer didn't act in an independent capacity claim***

*It is not plausible to suggest that the Independent Engineer did not act in an independent capacity – we have addressed this in our letter of 24 May 2020 (1.1 (d)) and page 5 of the Ombudsman Preliminary Finding. This claim by the Insurance Provider is ludicrous! The timing of this claim by the Insurance Provider is even more ludicrous!!*

*Firstly, [the Consultant Engineer] were well aware that they were appointed in an independent capacity to undertake the Ombudsman mandate of May 2016. The Ombudsman mandate of May 2016 clearly included in the remit, the need for an independent engineer to act in an independent capacity, therefore, [the Consultant Engineer] would have no doubt that they were working in an independent capacity! This suggestion by the Insurance Provider is a very unfair, unfounded and unprofessional characterisation of [the Consultant Engineer].*

*[The Consultant Engineer] undertook the mandate and provided a conclusion that confirms that damage to our home is pyrite related. It is not unreasonable that we asked [the Consultant Engineer] not to engage any further with the Insurance Provider because as far as we were concerned, [the Consultant Engineer's] task was complete i.e. he delivered on the Ombudsman mandate. Furthermore, [the Consultant Engineer's] position to not engage with the Insurance Provider is justified because his task was complete. Therefore, it is unreasonable that the Insurance Provider has interpreted this position as an indication that [the Consultant Engineer] were acting as 'our' expert.*

*Secondly, we totally refute that the Insurance Providers statement that [the Provider's] correspondence with [the Consultant Engineer] referring to the Complainants as 'your client' is irrelevant'. The Insurance Providers statement is very relevant as it is the Insurance Provider themselves who referred to us in correspondence as the Engineers client, which in turn prompted the Engineer to respond using the term 'our client'. Again, this behaviour is typical of the Insurance Provider whereby they repeatedly try to create ambiguity and situations they can manipulate to their advantage. We would view as despicable behaviour on their part!*

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- ***Communication Protocol***

*While the Insurance Provider's letter acknowledges there was no obligation on us to furnish documentation, their letter also refers to their 'expectations' and 'assumptions', and that they 'had no way of knowing' what documents were provided. We dispute this, because it is evident that there was nothing preventing them to actively engage or influence the investigation at the time. In addition, if the Insurance Provider in its professional capacity and with vast experience in the area of claim assessments, were intent on fulfilling the Ombudsman mandate of identifying an alternative proximate cause if not pyrite, they would have engaged more actively with us at the time if they deemed necessary – they did not. While they were kept informed at all times (including communication of [the Consultant Engineer's] testing proposal in October 2016), they raised no concerns or objections at the time.*

*At the end of the day, if the Insurance Provider had a set communication protocol they expected us to follow regarding communication with the Engineer e.g. copy them on the email communication, then they should have outlined this to us at the time. We are not the professionals in this case or have never had the experience of dealing with anything comparable. Similarly, given the complexity of the matter and the longevity of the claim, there was never any demonstration that they were engaging or working with us or in our best interests, in delivering on the Ombudsman mandate. One would expect more from the Insurance Provider as a professional firm!*

***Complaint 2: Incorrectly and unreasonably requesting further inspection by another engineer with further testing and investigation on the property***

- ***Our conduct and objection to further non-specific testing and investigation***

*The core of this complaint pertains to the past and current conduct of the Insurance Provider, which we have demonstrated on numerous occasions to be unreasonable, unjust and oppressive.*

*We totally refute the Insurance Provider's statement regarding our 'own conduct' regarding our objection to further testing and investigations following the conclusion of the Independent Engineers assessment (which confirmed damage to our home **is** pyrite-related).*

*Our objection to further testing and investigations is well founded in an attempt to put a stop to the unfair and overbearing behaviour of the Insurance Provider.*

*The reason we deem it unreasonable for further testing and investigations after the Independent Engineers final report is because such a proposal by the Insurance*

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*Provider is a mechanism to ignore/wipe out <u>previous</u> evidence of pyrite infill and damage – the Insurance Provider was unfairly trying to ignore existing and <u>prior</u> evidence by suggesting that further inspections are necessary. Furthermore, the situation of the Insurance Provider continuing to discount/dismiss the evidence provided by the 2 engineers is not compatible with the Ombudsman logic of appointing an Independent Engineer.*(The Complainants' emphasis)

*It is this <u>ongoing</u> 'playing-games' approach by the Insurance Provider that ultimately has us in this unfair position where they continually request more evidence and discount valid evidence in our favour, all at the same time failing to fulfil the Ombudsman's mandate, which places the onus on the Provider to identify an alternative proximate cause if not pyrite. This responsibility is formally with the Insurance Provider since March 2012 (over 8 years), and despite the numerous investigations we have facilitated, they have **yet** to even suggest an alternative proximate cause.* (The Complainants' emphasis)

*In addition, it is hypocritical for them to <u>now</u> expect further non-specific testing when they had no objection in October 2016 to the Independent Engineers testing proposal. Given they had no feedback or objection to the testing proposal, we are not surprised they were unable to clarify the non-specific testing that they requested 1 year later. We were open to facilitate further testing if they could confirm it was warranted, and if it would conclusively explain all reported damage to our house. However, the Insurance provider was unable to specify exactly what further testing was required by them.* (The Complainants' emphasis)

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- ***The 'nature of inconvenience' & Prior Conduct***

*Our objection to further non-specific testing and investigation is also an attempt to limit the level and nature of inconvenience that we have endured over the last 8 years, and with the intent that this case is resolved in the most fair, honest, and transparent manner. Therefore, it is a spiteful attempt on the part of the Insurance Provider to suggest that the delay in the resolution to our claim is down to our own behaviour.*

*While the Ombudsman awarded us compensation for inconvenience up to May 2016, it is inconceivable that the Insurance Provider's poor conduct continues (4 years later) despite this reprimand. Since the beginning of this case, our attempts to keep on top of countless complicated and distorted communications from the Insurance Provider has had a major impact on our personal lives and anxiety levels, and this experience is very unjustified. This experience is extended by the fact that despite facilitating numerous investigations including the most recent one by the Independent Engineer, the Insurance Provider dismisses or discounts them, and requests further investigations.*

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*Our primary priority is the remediation of our home and the final resolution of this case. We understand that our home currently falls into a category 'orange pyrite certificate: hardcore susceptible to limited or significant expansion', which makes our home unsellable. According to the Insurance Provider's retained Engineer '…' 'It is advisable not to buy a house in a suspected area unless it has been awarded a green certificate'. As a young family with 4 small children, this has resulted in significant financial and emotional stress and pressure, and the overall experience has placed a tremendous burden on our family life. We have never seen any indication from the Insurance Provider that they have placed our interests at the heart of their decisions or requests.*

*We accept the Ombudsman's current finding for an additional investigation, but as mentioned in our last response, we strongly doubt that the Ombudsman agrees that further testing is merited but rather the Ombudsman is disappointed that the Insurance Provider has created this situation. While we will facilitate an additional investigation, this does not deter from the current complaint whereby the Insurance Provider's request for further testing is unreasonable and unwarranted. It also does not deter from the Insurance Provider's onus to deliver on the Ombudsman mandate to identify an alternative cause if not pyrite.*

*While there is nothing in the Finding that restricts investigations to a single inspection, it is clear that the Insurance Provider is not recognizing that this claim pertains relates to a residential home. Is it fair on any customer to have to deal with the inconvenience of further and further inspections, which can involve the drilling and evacuation of the ground fill? To date, we have already facilitated 3 extractions and the latest inspection involved the kitchen, sitting room and hall tiles/wooden floors being lifted and replaced. This in itself is an unsettling and time consuming process.*

*It is also important to note, that despite us raising concerns and objections regarding additional non-specific testing, the Insurance Provider* ***never*** *put forward the option for the Independent Engineer to re-evaluate his conclusion based on sight of [Expert Geologist's] full opinion. This option would have been a more logical approach to progress the claim. However, the request for further non-specific testing is a clear indication to us of the Insurance Provider's desire to further complicate and prolong this case. With this in mind, we totally dispute their suggestion that delays to this case are down to our own conduct and our objection to testing, which as we have detailed above are well founded.*

*The level of inconvenience we have endured is also extended when we can see for ourselves other neighbouring houses, which have been remediated due to pyrite, including homes directly across the street from us. The fact that 21 out of 30 properties on our row were tested, and to date 10% of properties have been remediated is a very strong indicator that damage to neighbouring houses is indeed as a result of pyrite. We are not placed to comment on individual cases but we doubt that other property owners may be in a position to deal with similarly unjust*

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*demands from the Insurance Provider, including expensive testing to prove such pyrite related damage.*

*As we outlined in our letter of 24 May 2020, the prior conduct of the Insurance Provider is **categorically** linked to the current compliant i.e.: 'the Insurance Provider incorrectly and unreasonably requested further inspection by another engineer with further testing and investigations on the property.'*

*As we have outlined above, the reason we deem it unreasonable is because such a proposal by the Insurance Provider is a mechanism to ignore/wipe out previous evidence of pyrite infill and damage – the Insurance Provider was unfairly trying to ignore existing and prior evidence by suggesting that further inspections are necessary.* (The Complainants' emphasis)

*Our May letter also referenced to the fact that as part of our September 2017 complaint to the Ombudsman, we highlighted that 'as part of your adjudication process, we would be grateful if you could also consider our original FSO claim from July 2015 (FSO Ref No 14/82590) and all supported issues noted therein'.*

*We dispute the Insurance Provider's statement that 'the contents of [the Provider's] [internal] files and single file note is not relevant to the complaint'. The Insurance Provider's own internal files/working notes highlighted weaknesses in their case and clearly acknowledge that they accept there **is damage** to our home during the policy period. This is of course relevant to the current complaint, and this lack of transparency and honesty is a key contributing factor to our complaint 'the Insurance Provider incorrectly and unreasonably has requested further testing and investigation on our home'.*

*In summary and response to section 4 of the Insurance Provider's letter, the suggestion that prior conduct fall outside the scope of the current complaint is a very ambitious but weak attempt on the part of the Insurance Provider. Prior conduct is firmly interconnected with the current complaint – one cannot assess the current complaint without considering the contributing factors".*

13 July 2020 - submission from the Complainants in response to the Insurance Provider's letter of 01 July:

*They* [the Provider] *continue to attempt to muddy the waters i.e. twist the details of the case, play on words, imply a shortfall on our part or on the part of an expert who concludes in our favour etc. These twisted ongoing attempts are simply in the hope of diluting and deterring from the material facts of the case, and prolonging the case. We will not be deterred by this behaviour. Therefore, our response is drafted relative to the current complaint, and to discount their dishonest and unfounded attempts".*

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Following the consideration of the post Preliminary Decision submissions from the parties, together with all the evidence and submissions, my final determination is set out below.

**Analysis**

The Provider, in its post Preliminary Decision submission argues that the actions prior to the Provider's assessment of the appointed engineers' report are not part of the complaint to be examined and that direction in relation to compensation in that regard was incorrect.

I cannot ignore the fact that the lead up to the preparation of the report is interlinked to what is complained about by the Complainants. More importantly it relates to the direction that was made in the previous decision from the Financial Services Ombudsman as to the appointment and instruction of the engineer, which direction I contend the Provider failed to correctly implement.

Likewise I am satisfied that the revised level of compensation, as directed below, is correctly made in that regard.

The Provider disputes that it was endeavouring to suggest that the Financial Services Ombudsman's Finding made a direction to the Complainants, and thus placing the blame on the Complainants for failing to implement the direction.

I do not accept the Provider's position and remain of the view that the Provider did not correctly ensure that the appointed engineer was furnished with all the evidence that the Provider wanted considered by the appointed engineer for his review and report. I also remain of the view that the Provider incorrectly put all the blame on the Complainant for its deficiencies in not ensuring that the engineer was correctly instructed in accordance with the Financial Services Ombudsman's direction.

The Provider argues that in the Preliminary Decision, I dismissed the Provider's concerns on the proposed directions for further investigations to be carried out by the appointed engineer, and that this was a serious error of fact and law.

After reviewing all the post Preliminary Decision submission and on further consideration, I accept that a different Consultant Engineer be chosen to carry out the investigations and prepare a new report.

As I understand it, when Engineers Ireland originally provided a listing of 31 engineers deemed suitable to carry out an 'independent' assessment, there were 5 engineers deemed acceptable and 2 were from the firm of the Consultant Engineer that was ultimately appointed. That leaves 3 Consultant Engineers remaining from that list and I direct that newly appointed Consultant be chosen and agreed from this list of 3 Consultant Engineers. Should the parties not be able to agree on one Consultant, the selection from these 3 Consultant Engineers is to be made by way of a lottery, in the presence of the parties, or their nominated representative.

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The Provider argues that the Preliminary Decision contains no proper grounds to justify a compensatory award of €25,000, or indeed of any amount, for inconvenience and, as such, the Decision in relation to the compensatory award amounts to a serious and significant error of law.

I believe this shows a serious lack of understanding on the part of the Provider of the consequences of its conduct on the Complainant and the inconvenience it has caused. I remain satisfied that compensation is appropriate and reasonable, albeit at a lesser amount as directed under my Preliminary Decision. The reasons for this will be set out below.

In this regard 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:

> *"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***.

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I consider that it is important to set out the direction that was issued under the Financial Services Ombudsman's Finding of 20th May 2016. At pages 17 and 18 of the Finding of 20th May 2016, the Finding stated as follows:

> *"I direct that ... an independent third party engineer be selected by Engineers Ireland to conduct investigations and to produce a report. The scope of that engineers remit is to establish what is causing the damage to the Complainants' property. Therefore, the engineer's remit will be all inclusive and will have to include the engineers' opinion on whether pyrite is the cause of the damage. The Company has accepted that it will cover the costs of the independent engineer and if the engineer recommends further investigations, that it will also cover the cost of same. I direct such payments.*
>
> *If it is established that there is an insured defect, liability is to be accepted and the Company can opt to have its own engineer conduct the remedial works, as it so has that right under the policy.*
>
> *I am satisfied that this course of action is reasonable and that any Finding from this office on the assessment of whether pyrite or some other coverable event is the cause of the damage, must await the full rigours of the Company's claim assessment, on the basis that the Company's burden of proving the actual cause of damage has not fully concluded".*

The evidence shows that a Consultant Engineer was selected as directed. However, what is evident is that the Provider does not appear to have engaged with the Consultant Engineer as to what reports it wanted the Consultant to have. It appears that the Provider incorrectly left all the initial communications with the Consultant Engineer that was required in relation to the above direction, to the Complainants. I do not accept that it was appropriate for the Provider to do so. It was the Provider's responsibility, not the Complainants, to ensure the direction was implemented and furnish all the information that the Provider considered necessary.

I consider that the Provider and the Complainants should have first agreed what information was to be provided to the Consultant Engineer but it was the responsibility of the Provider to ensure compliance with the Ombudsman's direction.

In this office's schedule of questions the Provider was questioned as to why the Provider did not supply the appointed engineer from the outset with the information it is now arguing was not before that Engineer for his consideration.

This office also questioned the Provider as to why it considered it appropriate to question what information was before the appointed engineer when (as it appears) it did not itself ensure that the information was before the appointed engineer from the outset.

The Provider's response was that the opinions expressed by expert geologist, as a leading independent expert in this area, providing an assessment of reports provided to evidence

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the ‘cause’ of loss rather than the 'effect' as reported on by the Consultant Engineer, are highly relevant to the issues under consideration in the Consultant Engineer’s Report and, therefore, the Provider would expect them to have been referenced in the Consultant Engineer’s Report if they had formed part of the Consultant Engineer’s review.

The Provider submits that as noted above, the geologist’s information is pertinent to:

(i) any objective assessment of the ground conditions at the Complainants Property and the potential causes of the problems alleged, as referenced in the 4 April 2017 Report; and
(ii) the Provider’s response to the Complainants’ complaint (insofar as that complaint is based on the Consultant Engineer’s Report of 4 April 2017).

The Provider was asked by this office whether the Provider or its agents / specialists interacted with the appointed engineer in relation to site visits, content of reports etc. The Provider’s response was that the scope of the investigations the Consultant Engineer proposed to undertake were detailed in their attached letter of 6 October 2016. The Provider however states that given the direction by the Ombudsman that all the evidence in relation to this claim should be considered by the engineer, it was assumed that the Complainants had complied with this FSO Direction, which the Provider says it later discovered to be incorrect. I would point out that the FSO made no direction in respect of the Complainant. The direction was to the Provider. It was ultimately the Provider’s responsibility to ensure the direction was implemented correctly. I will return to this later.

This office in its schedule of questions asked the Provider whether it was satisfied that it has complied with the Ombudsman's directions set out in the Decision dated 20th May 2016, and if so to outline how it considers it has done so.

The Provider states that it is satisfied that it has complied with the FSPO direction of 20 May 2016 as, among other things, it took steps to follow the FSO decision in paying for an independent engineer to report on the alleged damage to the Complainants' property. The Provider submits, however, it is its position that the Complainants failed to comply with the FSO Decision of 20 May 2016. The Provider states that this is so because the Consultant Engineer was required, in accordance with the terms of the FSO's 20 May 2016 direction - to be:

*“ an independent third party engineer . . . to conduct investigations and to produce a report. The scope of that engineer's remit [was] to establish what is causing the damage to the Complainant's property. Therefore the engineer's remit will be all inclusive and will have to include the engineers opinion on whether pyrite is the cause of the damage ..”*

I note a number of statements by the Provider in its complaint response submissions as follows:

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*"[The Provider] assumed the Complainants had complied with the FSOs' instructions and provided 'all the evidence' when unilaterally appointing [the Engineer] on 23 August 2016"*

*"It was assumed that the Complainants had complied with this [FSO] Direction"*

*"the Complainants failed to comply with the FSO Decision of 20 May 2016"*

*".. it can only be concluded that the [FSO'] 20 May 2016 direction that an "independent third party engineer" be appointed to inspect and report on the property has not in fact been yet been complied with"*

This is a most serious situation that a Direction of the Financial Services Ombudsman to the Provider, which, in the absence of any appeal to the High Court, was legally binding on the parties, has not, by the Provider's own submission, been implemented by the Provider, over four years later. The Provider in its original responses to this complaint, appears to be have been labouring under a misapprehension that the Financial Services Ombudsman Finding of 20 May 2016 made a direction to the Complainants. It made no such direction. I note the Provider seems to have recoiled somewhat from this position in its post Preliminary Decision submissions. However, the fact remains that the responsibility for implementing that Finding rested solely with the Provider.

I would point out to the Provider that it ought to know that the role of the Financial Services Ombudsman was to adjudicate on complaints by consumers about conduct of financial service providers. Having done so the Financial Services Ombudsman made a Direction in accordance with Section 57CI (2)(g) of the Central Bank and Financial Services Authority of Ireland Act 2004. The Finding informed the parties that the Finding was legally binding on the parties, subject only to an appeal to the High Court within 21 calendar days.

For the avoidance of doubt I must again reiterate that the Direction in the Financial Services Ombudsman's Finding of May 2016 was:

*"Having regard to all of the above, it is my Finding that the complaint is partly upheld. For the identified failing by the Company in not being pro-active in seeking evidence and establishing the cause of the damage, in the absence of its conclusion that pyrite was not the cause of damage, I direct the payment of €3,000 to the Complainants. I also direct that the Company cover the costs of the additional investigations and reports obtained by the Complainants from June 2012 to date. In this regard it is noted that as early as June 2012 the Company's representative (A…), accepted that the Complainants had supported their case for cover to apply, as follows:*

*"To date we have received a detailed report from [firm's name redacted] dated 22nd March 2012 in relation to the above property which has largely followed our protocols and details all the damage identified in this house including a floor survey which notes all level variations of the ground floor slab"*

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*It was at this stage that I consider that the burden had shifted to the Company to conclusively establish an alternative cause, when it was not accepting the Complainants claim for pyrite damage. Therefore, I direct that the payment for the additional investigations / reports arranged by the Complainants be made to Complainants upon receipt by the Company from the Complainants, evidence of them paying for the investigations / reports.*

*Should the Complainant agree to the Company's proposal as regards a further inspection of the property and the Company subsequently concludes that it is not liable, the matter can at the Complainants' discretion be referred back to this office as a new complaint for our consideration.*

*It is now necessary for the Complainants to communicate to the Company whether they wish the Company to proceed on the above basis, thereafter the Company is to contact Engineers of Ireland to identify an independent engineer agreeable to both parties to carry out the investigations. I expect that should the Complainants agree to the proposal, that matters should proceed in a timely manner and the Company should ideally have its final decision on the claim within 10 weeks of the date of the Complainants communication of their acceptance of this course of action.*

*It is my Finding that this complaint is partly upheld* ***and I direct the Company accordingly in respect of all of the above actions".*** [My Emphasis]

I fail to see, if the Provider read the Finding of 20 May 2016 how it was in any doubt that it was the **Provider** which was being directed to undertake the Direction in the Finding. It was most unreasonable and totally incorrect that the Provider sought, at any stage to suggest that the Finding made a direction in relation to the Complainants. It clearly did not.

The Financial Services Ombudsman and this Office never make directions in relation to a Complainant. The Provider ought to know, and if it had read the Finding of 20 May 2016, would have known that the Direction in the Finding was made in respect of the Provider. This direction became legally binding, as it was not appealed to the High Court. It is most disappointing and unreasonable that the Provider sought to place the blame on the Complainants for its failing to fully and correctly implement the Direction in the Finding of 20 May 2016.

I do not hold the Complainants responsible for the implementation of the direction of the FSO. The FSO or this office do not issue directions to Complainants. It was the responsibility of the Financial Service Provider to ensure that the directions were correctly implemented.

Furthermore, the Provider has the experience of how such matters should proceed and I consider it should reasonably have made sure that it was more engaged with the Consultant Engineer, from date of his appointment. It is clear that the FSO did not make one party the sole communicator with the proposed independent engineer. That said, I do

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accept that there must be co-operation between all the parties to bring a conclusion to the matter.

It is also clear that the Finding directed that the Provider would retain the ultimate role of deciding the claim and that the appointed engineer's report, was not to be the sole basis upon which the claim outcome was to be decided. This was clarified for the parties in a letter of 28 June 2016 where this office stated:

> *"As regards the new engineer's role, it was always the intention that the new engineer would give an opinion and not make the final determination on the claim. For the avoidance of any doubt, the claims determination remains with the Insurance Company, but should that determination be that the claim does not meet the policy criteria for payment, the Complainant can, at his discretion, refer the matter back to this office as a new compliant for a Finding from this office".*

It is most unreasonable and unacceptable that the Consultant Engineer's report (which it was intended to be the report that would help conclude matters one way or the other) is now called into question for lack of completeness as to the evidence that should have been considered by the Consultant Engineer. I lay the greater responsibility with the Provider for the situation that has arisen.

I do accept the Provider's position that a further review and report is required to bring matters to a conclusion. This is most unfortunate but necessary. The decision on the cause of the damage has still to be established and until the Provider has given its claim decision on whether the cause of the damage falls within or without the policy cover, I cannot give a decision on whether the Provider's decision in that regard is correct or reasonable. It must be noted that the Provider, agreed that the burden of proof had shifted to the Provider to investigate the proximate cause of damage.

After reviewing all the post Preliminary Decision submission and on further consideration, I conclude that an alternative Consultant Engineer be chosen to carry out the investigations and prepare a new report.

As stated above, when Engineers Ireland originally provided a listing of 31 engineers deemed suitable to carry out an 'independent' assessment, there were 5 engineers deemed acceptable and 2 were from the firm of the Consultant Engineers that was ultimately appointed. That leaves 3 Consultant Engineers remaining from that list and I direct that newly appointed Consultant be chosen and agreed from this list of 3 Consultant Engineers. Should the parties not be able to agree on one Consultant, the selection from this 3 Consultant Engineers is to be made by way of a lottery, in the presence of the parties.

Therefore, it is my Decision that the complaint is partially upheld and I direct the following to bring matters to a conclusion.

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(i) The inspection and report be re-done by the different Consultant Engineer (to be paid for by the Provider). The Consultant Engineer is to be instructed on the basis of agreed instructions and documentation. The parties will each be responsible for furnishing documentation that they believe the different Consultant Engineer has to have regard to, each party is to submit what they believe to be appropriate, and the different Consultant Engineer is to be instructed by the Provider. I am satisfied that the Provider as the claim decider and expert in claim assessments should be the primary party to instruct the different Consultant Engineer.

(ii) In the above regard the different Consultant Engineer is to receive instructions — from the Provider's engineer - as to what form of additional testing is required (additional to what the different Consultant Engineer considers is necessary) to establish the proximate causes for the cracking damage, whether that is pyrite or other causes (this addresses the Complainants' concern that there was "non-specific" testing sought by the Provider);

(iii) The different Consultant Engineer, should be instructed by the Provider, having reviewed the agreed documentation, and having inspected/tested the property, the different Consultant Engineer should prepare and submit an independent opinion on whether the cracking damage is the consequence of pyritic heave, or some other proximate cause, that occurred and caused cracking damage to the property. I do not intend to set a date from when the occurrence of the damage must predate as suggested by the Provider.

(iv) The Provider is to give its fullest co-operation to the different Consultant Engineer and it must give its claim decision to the Complainants on whether the claim is to be met under the policy conditions, within 6 weeks of it receiving the different Consultant Engineer's report.

If the Provider's decision is that the damage does not fall within the policy cover for remedying, it will be open to the Complainants to make a complaint to the FSPO for a determination of whether the Provider correctly and reasonably came to its claim decision having regard to all of the evidence.

Given the unreasonable conduct of the Provider since the Direction was given by the Financial Services Ombudsman in May 2016 and the additional considerable inconvenience this has caused to the Complainants, I further direct a compensatory payment of €15,000 (fifteen thousand euro) be paid to the Complainants. After reviewing all the post Preliminary Decision submission and on further consideration, I considered that a lesser compensatory payment is merited than that proposed in my Preliminary decision. I accept that greater co-operation was required from both parties, if this matter is to be brought to its conclusion, and it is clear that this co-operation has not fully forthcoming from both parties to date. The compensatory payment I am directing is for the inconvenience caused to the Complainants by the incorrect and unreasonable stance taken by the Provider in not fully engaging with the appointed Consultant Engineer in the first place and in its acquiescence as regards the Complainants' control of that process, only then to dispute the Consultant Engineer's findings on the basis of the information that was, or was not, supplied to that Engineer. This has substantially extended the already very lengthy period for a conclusion to this matter for the Complainants, and further greatly added to the inconvenience the Complainants have suffered.

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**Conclusion**

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is partially upheld, on the grounds prescribed in ***Section 60(2)(b),(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 pay the compensatory payment of €15,000, to have a new report arranged by a different Consultant Engineer, and thereafter give its determination on the claim. The Provider is to make the compensatory payment to the Complainants in the sum of €15.000, 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.

- 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**

22 December 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.**