An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0484
Sector:	Insurance
Product / Service:	Retail
Conduct(s) complained of:	Rejection of claim Claim handling delays or issues Delayed or inadequate communication
Outcome:	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint relates to a dispute regarding a claim under an insurance policy held by the Complainant, a publican, with the Provider, an insurer.

The Complainant's Case

The Complainant incepted an insurance policy with the Provider in July 2014. The documentation furnished indicates that it was due for renewal, and renewed, for the year 2015/2016, on 20 August 2015. The policy has a number of sections covering various risks, including public liability. Certain numbered endorsements are shown in the schedule and on the renewal notice as applying to the relevant sections of the policy.

The Complainant asserts that the first step taken by the Provider following notification of the claim was to appoint surveyors to carry out a survey of the premises. He states that the survey was carried out on 18 April 2016, and that afterwards his broker informed him that, *"the Insurers were reserving their rights in respect of the potential claim"*.

The next event that the Complainant states took place was that the Provider informed the Complainant, through his broker that, *"the premises were below average in several critical respects and that urgent repairs were required"*. The Complainant asserts that the surveyors had not indicated to him during the survey that the premises were *"below average in any material particular"*, and that he was, therefore, surprised by this outcome.

The Complainant states that the Provider suspended cover under the policy until such time as the repairs were completed. The Complainant has furnished this office with copies of the email communications with his broker in that regard.

The documents furnished by the Complainant indicate that the repairs to the premises were completed, and that the Complainant notified his broker to this effect on 16 June 2016. He states that on 26 July 2016 the loss adjustors appointed by the Provider, *"formally declined coverage in respect of* [the claimant's] *potential claim"*. The Complainant states that the Provider declined indemnity because of breaches of what are described as, *"conditions precedent to indemnity"* under the policy.

In his Complaint Form, the Complainant has set out details of the earlier communications, whether by letter or email, regarding the grounds of his complaint and the Provider's response. He has also appended supporting documents, including email threads wherein more detailed arguments on the points at issue are set out.

1. In his Complaint Form, the Complainant details his complaint about the suspension of cover, the unreasonable requirement to carry out extensive repairs to the premises, the reasons why he argues that the declinature of the third party claim is defective, and the reasons why he contends that the Provider has not treated him fairly.

2. In his letter dated 2 December 2016, the Complainant disputes the Provider's declinature of liability for the third party claim on the basis that *"*[o]*n the facts there has been no breach of endorsements 23, 24 and 27 as they appear on the relevant policy"*. He goes on to explain how he was not in breach of the requirements of each endorsement.

3. In his letter dated 13 April 2017, the Complainant informs the Provider that he wished it to treat the matter as being a complaint for the purposes of the Consumer Protection Code 2012 as amended ('CPC'). He then set out details of the history of his relationship with the Provider and the nature of his complaint against the Provider.

   The Complainant then refers the Provider to his letter dated 2 December 2016 and makes five further points in support of his complaint regarding the survey of the premises after the claim had been notified rather than prior to granting cover, the asserted wrongful suspension of cover after the survey had been carried out and the requirement to have extensive repairs carried out before cover would be restored in circumstances where he states there was only three months of cover remaining under the policy.

/Cont'd…

4. In the email dated 15 May 2017, the Complainant sets out a number of detailed arguments in support of an overall assertion that the Provider's conduct was *"unfair, unreasonable and without foundation for the loss adjustors to decline coverage based on alleged breaches of endorsements 24 and 27, since insurer's own survey report demonstrated that there had been no breach of either endorsement"*.

In its Final Response to the complaint, dated 16 June 2017, the Provider agreed to withdraw its reliance on Endorsements 24 and 27 in relation to the declinature of indemnity for the third-party claim in question. It indicated its continued reliance on Endorsement 23 (that dealing with CCTV) in relation to the decision to decline indemnity.

In his email dated 15 November 2017 to the Provider, the Complainant rejects the Provider's arguments with regard to the applicability of Endorsement 23 as grounds for declining indemnity under the policy and indicated his intention to pursue his complaint with this office.

The complaint is that the Provider has wrongfully repudiated liability under the public liability section of the Complainant's policy in respect of a third-party claim, in circumstances where the Complainant argues that the declinature is defective for a number of stated reasons. The complaint is also that the Provider wrongfully suspended cover under the Complainant's policy for a period, and acted unreasonably in requiring extensive works to be carried out within a short timeframe, in circumstances where the Complainant argues that failure to comply would have prejudiced his ability to obtain alternative cover.

In his Complaint Form, when asked how he would like the Financial Service Provider to put things right, the Complainant stated:

> *"By undertaking to provide an indemnity in respect of* [the Claimant's] *claim or to make a contribution in respect of the ultimate amount thereof."*

The Provider's Case

The Provider maintains that it was entitled to reject the claim by reference to the terms and conditions of the policy. Specifically, the Provider relies on a particular endorsement to the policy (having initially relied upon three separate endorsements) which it argues placed an obligation on the Complainant to 'make' and to retain ('to store') CCTV footage captured within the premises. The Provider argues that in circumstances where the Complainant did not make and retain CCTV footage, and in circumstances where the relevant endorsement is expressed as a *"condition precedent"* to liability, it was entitled to decline to provide the indemnity sought.

/Cont'd…

The Provider sets this out in an email of 16 June 2017:

> *"With regard to Endorsement 23, you have argued that this does not require you to have a recording CCTV system at all, but that, if you do, the system must keep recordings in accordance with the endorsement wording.*
>
> *As part of my investigations I have considered the information you provided when the policy was purchased. When you applied for insurance, a question on the application form asked whether you had a CCTV system in place. The record indicates that the answer was Yes. It is immaterial whether this answer was provided by yourself or by your broker and your broker as a matter of law is acting as your agent and you are legally bound by your broker's acts. The fact that you (or your broker) confirmed the existence of a CCTV system led to your insurance being accepted by* [the Provider]. *You had the opportunity to review and correct the documentation issued to you and did not do so. There was no amendment to the information regarding the CCTV system at the inception date of the policy period in which the alleged incident arose. However, it has become clear that the CCTV system was not operating at the time of the alleged incident nor had it been operating for some time prior to that. At no point did you advise* [the Provider] *that the CCTV system was not working. If you/your broker say that there is CCTV system in place, it is entirely reasonable for an insurer who is assessing your risk to assume that it is working. This is because if the CCTV system is not operating, there is in fact no CCTV system at all.*
>
> *A CCTV system is an essential loss prevention and detection tool and* [the Provider's] *standard expectation. You plainly said it existed: however, its absence is an important factor in assessing the insurance risk presented by your business. It is a fundamental and logical foundation underpinning Endorsement 23 that your CCTV system must be operating and must be recording as stated clearly within Endorsement 23. My conclusion is the lack of an operating CCTV system to the required standard (which you previously said you had) has prejudiced* [the Provider's] *position, even if there was no camera coverage of the area where the alleged incident took place. This is because CCTV evidence would have confirmed whether (a)* [the third party] *was on the premises at all and (b) if he was on the premises, whether he was showing any signs of any injury or unusual behaviour – for example there might have been corroborated evidence that he was being attended to after an accident or injury, or was limping. Furthermore, I repeat that in my assessment you did not have a CCTV system at all (though you said you had one), because it was not operational. This is irrespective of whether it was a recording system or not and is clearly in breach of the condition precedent arising out of Endorsement 23.*
>
> *Accordingly I have concluded that you were not in compliance with the Endorsement 23 at the time of the alleged accident sustained by* [the third party]. *As Endorsement 23 is expressed as a condition precedent to liability (the importance of which term your letter of complaint clearly shows you have properly understood), I also conclude that* [the Provider] *was correct to refuse indemnity for this alleged incident."*

/Cont'd…

With regard to the direction provided to the Complainant to undertake certain risk minimisation works, the Provider maintains that the terms and conditions of the policy entitled it to request the Complainant to complete these works.

The Provider further maintains that where "*a large number of requirements are immediate and the survey is below standard"* it retains the right to temporarily suspend cover under a policy, noting that this is "*fairer"* and more *"sensible".*

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

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

A Preliminary Decision was issued to the parties on 19 June 2020, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the Provider made a submission to this office under cover of a letter from a third party, a copy of which was exchanged with the Complainant.

The Complainant responded under cover of his e-mail to this office dated 22 July 2020, a copy of which was transmitted to the Provider for its consideration.

Having considered the post Preliminary Decision communications received from both parties, and all of the submissions and evidence furnished to this office by both parties, I set out below my final determination.

/Cont'd…

Prior to considering the substance of the complaint, it will be useful to set out the relevant terms and conditions of the policy.

Policy Terms and Conditions

The Provider has, at various points, relied upon the following Endorsements to the Policy:

> ***Endorsement No. 23: CCTV retention***
>
> *It is a condition precedent to the liability of insurers that the insured shall ensure that CCTV recordings are stored in a safe place for a minimum of 30 days, unless an incident has occurred that may give rise to a claim, when a 90 day retention period is required.*
>
> ***Endorsement 24: Spillage Management System***
>
> *It is a condition precedent to the liability of insurers that the insured puts in a spillage management system for liquid spilt on the premises. This system must also include visual checks on floors on a regular basis.*
>
> ***Endorsement 27: Toilet cleaning system***
>
> *It is hereby noted and agreed that the Insurers will not provide an indemnity to the Insured in respect of any claim arising out of any slips, trips or falls in the toilets unless a written documented system is in place recording the times and dates of the cleaning of toilets. These documents should be retained for a period of 3 months unless any incident occurs in which case the relevant documents should sent onto the Insurers.*

Endorsements to the policy in question are expressly stated to be "*Operative Only if Indicated in the Schedule*". The Provider has furnished the 'Schedule of Combined Insurances' in respect of the renewal of the policy relating to the period 20/08/2014 to 19/08/2015. The public liability section of this schedule lists only Endorsement 27 of the three Endorsements reproduced above.

The Provider has also provided the 'Schedule of Combined Insurances' in respect of the renewal of the policy relating to the period 20/08/2015 to 19/08/2016. The public liability section of this schedule lists Endorsements 23, 24 and 27, among others.

/Cont'd…

Analysis

The primary aspect of the Complainant's complaint relates to the refusal by the Provider to indemnify the Complainant, by reference to the 'Commercial Combined Policy' in force, following a claim made by a third party against the Complainant.

I propose to address this primary aspect of the complaint first before going on to consider the other aspects advanced.

In early 2016, a third party (a member of the public) claimed to have suffered an injury on the premises of the Complainant, claiming to have suffered a fall in a corridor adjacent to the toilets. The premises were the subject of an insurance policy which the Complainant had incepted with the Provider in 2014 and which had been renewed in August 2015. The insurance policy provided for public liability cover and the Complainant sought an indemnity from the Provider.

The Complainant notified the fact of the claim by the third party to the Provider on 21 March 2016, following the receipt of a letter of claim on behalf of the third party dated 9 March 2016. Following investigations, in July 2016 (there are identical letters dated 15 July and 26 July respectively), the Provider declined to provide the indemnity sought citing alleged breaches of Endorsements 23, 24 and 27 (reproduced above). The letter(s) quoted the Endorsements which had allegedly been breached. However Endorsements 24 and 27 were misquoted insofar as the wording cited in the letter(s) imposed a greater onus on the Complainant than the actual wording as contained in the Complainant's policy.

Thereafter, but only following extended interaction between the Complainant and the Provider, the Provider, in email correspondence dated 16 June 2017, abandoned its reliance on Endorsements 24 and 27. This stemmed both from the fact that the endorsements had been misquoted and the fact that a survey commissioned by the Provider did not support any breach of Endorsements 24 or 27 as actually worded. The Provider however maintained its reliance on Endorsement 23 and stood over its earlier decision to decline to provide an indemnity. This compelled the Complainant to incur expense in the retention of solicitors to meet the legal claim of the third-party, an action the Complainant notes he has taken in the prudent effort to mitigate his loss.

As the Provider had abandoned its reliance on Endorsements 24 and 27 prior to the Complainant's complaint to this office I do not propose to examine this matter further and will limit my analysis to whether the Provider is entitled to rely upon Endorsements 23 in declining to provide the indemnity sought.

However, given the unreasonable and unacceptable conduct of the Provider in misquoting from the policy in a manner that imposed a greater onus on the Complainant than the actual wording as contained in the Complainant's policy, I indicated in my Preliminary Decision my intention to bring this conduct to the attention of the Central Bank of Ireland.

/Cont'd…

The Provider, in its post Preliminary Decision submission, states:

> *"We regret that errors have been made in this case. In particular, that it was not identified that the appointed Loss Adjuster had misquoted Endorsement 24 and 27 in the declinature letter and that those Endorsements were, unfortunately, relied upon until 16 June 2017: when the Complainant's initial complaint was issued.*
>
> *Taking into account these errors, we will admit the claim for assessment under the policy, including payment of all reasonable legal expenses already incurred by the Complainant in defence of the claim. In addition, we will make a payment of €20,000 to the Complainant in recognition of the inconvenience caused to him by the errors made".*

The Provider's post Preliminary Decision submission continues and quotes the section of my Preliminary Decision in which I indicated my intention to refer the matter to the Central Bank.

The Provider details that It:

> *"Would like to take this opportunity to comment on the changes in claims practices that have been in place since 2017, and which have prevented re-occurrence of issues like those encountered in the present case. Whilst acknowledging, with regret, the claim handling errors made, we contend that this is an isolated incident and is not indicative of any ongoing or persistent failings on behalf of [named financial service provider]"*

The Provider, in its post Preliminary Decision submission, details how it believes the misquoting error occurred. The sequence of events and errors outlined by the Provider appears to have occurred because of the involvement of a number of third parties, working on behalf of the Provider, in processing the claim.

Most importantly, the Provider also details the remedial steps taken by it, to prevent another occurrence like in the present complaint.

It submits that:

> *"During November 2015 this was identified by the Provider as a possible issue and alterations were made with the [coverholder] such that the wording of each endorsement was thereafter set out on the Policy Schedules issued by the Provider via [the coverholder]. This meant that the endorsement wordings have since this alteration in November 2015 been clearly detailed in the key coverage document i.e. the Policy Schedule; such that the type of error that occurred via the [named specialist adjuster] is now extremely difficult to repeat".*

/Cont'd…

The Provider states that *"since April 2017, the Provider has also changed its claims handling arrangements, partly (although not entirely) as a result of the error made by [*named specialist adjuster] in this case".

The Provider submits that when this incident occurred *"[named specialist adjustor] was the only specialist adjuster with authority to handle claims from 'cradle to grave' on behalf of the Provider".*

The Provider also highlights the changes it has made in relation to the third parties it now engages to process claims.

I accept the Provider's position that: "*this is an isolated incident and is not indicative of any ongoing or persistent failings…"* It would also appear that the Provider has taken sufficient steps to prevent a re-occurrence of the misquoting of policy terms. On the basis of this information, I do not believe it will be necessary to bring the matter to the Central Bank on this occasion.

In considering the conduct of the Provider in relying on Endorsement 23 to decline to provide the indemnity sought, the first document that requires consideration is the insurance "*Enquiry Form*" completed prior to August 2014. This was submitted to the Provider by the Complainant's broker on behalf of the Complainant. This document includes a 'Security' section in which 'Y' (for 'yes') is inputted next to 'CCTV'. A 'Commercial Risk Proposal Form' completed by the Complainant on 31 August 2014 contains no reference to 'CCTV' notwithstanding that this form also includes a 'Security' section.

The public liability section (Section 12) of the policy itself is contained on a single page (page 44); it contains no reference to 'CCTV'. Both the General Conditions of the policy which are applicable to Section 12 and the General Exclusions of the policy which are applicable to Section 12 omit any reference to 'CCTV'. Therefore, the only reference to 'CCTV' contained within the policy which is relevant to my consideration of this matter is to be found within Endorsement 23, to which I will now turn my attention.

Endorsement 23 provides as follows:

> *It is a condition precedent to the liability of insurers that the insured shall ensure that CCTV recordings are stored in a safe place for a minimum of 30 days, unless an incident has occurred that may give rise to a claim, when a 90 day retention period is required.*

The Complainant takes the view that no requirement for CCTV recordings should be implied whereas the Provider holds the opposing opinion. The Provider set its position out in detail in the email of 16 June 2017, reproduced in the Provider's Case above.

I would point out that the definition of 'CCTV' does not automatically include a system with a recording facility. 'CCTV' stands for 'Closed Circuit Television', and it is equally possible to have a CCTV system that is connected to monitors, but which does not record, as it is possible to have a system that does record.

/Cont'd…

The policy in question here does not contain a clause which expressly or explicitly requires the use of a CCTV system which records images; the question is thus whether Endorsement 23 should be interpreted as an implied requirement for the recording of images.

I would also point out that although reference is made in the email of 16 June 2017 to an alleged failure on the part of the Complainant to notify the Provider of the fact that the CCTV system was no longer operational or had ceased working, the decision to stand over the rejection of the Complainant's claim is built entirely on an alleged breach of Endorsement 23. This is significant for two reasons. Firstly, in light of the above, I do not view it as part of my function to analyse any alleged failure on the part of the Complainant to disclose a new material fact (that is, the fact that the CCTV system had either ceased recording or that it had ceased functioning entirely) as a ground subtending the Provider's decision to decline an indemnity. In other words, the Provider does not formally articulate the defence of its position by reference to a non-disclosure; rather it relies solely on a failure to have and to keep CCTV recordings which it argues is contrary to Endorsement 23.

Secondly the reliance on an alleged breach of Endorsement 23 alone is significant and, it would appear, stems from the fact that there seems to be some confusion as to whether, on the date of the incident, the CCTV cameras were operational in the sense of sending images to monitors but not recording, or whether they were not even sending images to monitors.

In circumstances where there is no dispute but that the CCTV was operational in some capacity at the time of completion of the 'Enquiry Form' and at the time that the policy was originally incepted, in circumstances where there is no valid reliance on any non-disclosure, and in circumstances where, as will become apparent below, I do not view the policy as requiring the maintenance of a CCTV system which records, this confusion is not material to my decision and does not require to be resolved by me.

I now turn to an examination of the Provider's reliance on Endorsement 23. The Provider's position can essentially be extracted from the passage reproduced earlier insofar as it is encapsulated in the following two sentences:

> *It is a fundamental and logical foundation underpinning Endorsement 23 that your CCTV system must be operating and must be recording as stated clearly within Endorsement 23. My conclusion is the lack of an operating CCTV system to the required standard (which you previously said you had) has prejudiced* [the Provider's] *position, even if there was no camera coverage of the area where the alleged incident took place.*

In its response to this office, the Provider stated as follows (underlining added by me):

> *The Condition Precedent is clearly stated in the policy documentation and is in clear fair language that is neither ambiguous nor misleading.*

/Cont'd…

> *The clause is a simple requirement and it is not conditional upon the CCTV system being capable of recording. <u>There is simply a requirement to make CCTV recordings and to keep them.</u>*

I disagree with the Provider's analysis. As I have already pointed out, a CCTV system does not necessarily denote a system that records. It is perfectly possible to have a CCTV system that does not record; in this regard, I might note that the Provider's reference to "*the required standard (which you previously said you had)*" is misleading and unfair insofar as it implies that the Complainant had previously confirmed that he had a recording CCTV system. He did not. The Complainant simply confirmed he had a CCTV system without ever specifying, in the 'Enquiry Form', whether it recorded (indeed the Complainant argues that he orally advised his broker that the system did not record albeit that the Provider denies ever being advised of this by the broker). Furthermore, I have been furnished with no evidence that the "*required standard*" was ever clearly specified or articulated to the Complainant by the Provider.

I believe it is clear that the policy does not expressly require the maintenance of a CCTV system which records.

I will now return to the question as to whether Endorsement 23 should be interpreted as an implied requirement for the recording of images. I am not satisfied that it should.

A plain reading of the endorsement discloses that the clause requires only the storage of recordings for a specified period. There is no requirement anywhere in the policy that recordings be created; in this regard I entirely disagree with the Provider's statement that there is "*simply a requirement to <u>make</u> CCTV recordings …"* I am thus satisfied that the endorsement only becomes operable in the event that recordings have been created or exist. In this case, the Complainant is not in breach of the requirement to ensure that "*recordings are stored in a safe place for a minimum of 30 days"* as no recordings exist; in other words, the Complainant has not failed to appropriately store recordings. The Complainant could only be in breach of the said clause if recordings did in fact exist which he failed to store as required. If the Provider wished to impose an obligation on the Complainant to maintain a CCTV system which created recordings, this should have been clearly stated in the policy. In this regard, Endorsement 23 can be neatly juxtaposed with Endorsement 124 (an endorsement that was not activated on the Complainant's policy) which requires security personnel to "*wear functioning cameras which record*".

I believe that the Provider cannot rely on Endorsement 23 as a basis on which to decline to provide an indemnity. I have arrived at this conclusion on reading the words of the endorsement and on the basis of a consideration of the rule of *contra proferentem*, which is a legal doctrine which dictates that where a term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording. In other words, if there is any doubt about the meaning or scope of a clause, the ambiguity should be resolved against the party seeking to rely on the clause.

/Cont'd…

In light of the foregoing, and in circumstances where I believe none of the grounds on which the Provider relied for rejecting the claim are justified, I will direct that the Provider admit the claim for assessment.

I will also direct the Provider to pay all reasonable legal expense already incurred by the Complainant in defence of the claim by the third party. I am also of the view that compensation is warranted in circumstances where two endorsements were misquoted in the documentation provided to the Complainant and in circumstances where the same two endorsements were relied upon by the Provider until 16 June 2017 notwithstanding that a survey completed in May 2016 noted that the Complainant was "*compliant*" in respect of the two endorsements in question. This represents a very significant period during which improper grounds were maintained. The Provider has acknowledged a failing here and, in its response to this office, has "*apologise*[d] *unreservedly*" albeit that it did not explain the failings to the Complainant or this office until receipt of my Preliminary Decision.

I will now deal with the aspect of the Complainant's claim which relates to the temporary suspension of cover by the Provider (as from 31 May 2016) and the Provider's insistence that the Complainant carry out various remedial work to the premises prior to the reinstatement of cover (which occurred on 17 June 2016).

In an email of 2 June 2016 from the Provider's agent to the Complainant's agent, the following is stated:

> *Our option to survey the risk and impose requirements at any time was specified in the original quotation to you by* [name redacted] *in our office.*

An email from the identified individual dated 17 July 2014 providing a quote for insurance noted the following under 'Conditions':

> *Risks are subject to survey at any time*

The General Conditions of the policy include the following at number 8:

> *The insured at his own expense shall:*
>
> *(a) take all reasonable precautions to prevent or diminish Loss or Damage or any occurrence or cease any activity which may give rise to liability under this Policy and to maintain all buildings furnishings ways works machinery plant caravans and vehicles in sound condition*
>
> *(b) exercise care in the selection and supervision of Employees*
>
> *(c) as soon as reasonably practicable after discovery cause or any defect or danger to be made good or remedied and in the meantime shall cause such reasonable additional precautions to be taken as the circumstances may require*

/Cont'd…

In light of the above, I accept that the Provider was entitled to attend at the Complainant's premises for the purposes of carrying out a risk survey and to detail certain risk minimisation work that must be completed in order for cover to be retained.

With regard to the work detailed to be completed by the Provider, I have considered the content of the survey and the works identified as required and I do not consider the matters listed to be unreasonable. Insofar as carrying out the works may have placed a significant financial burden on the Complainant, I accept that the works required were not unreasonable and the Complainant was free to decline to carry out the work and to seek insurance elsewhere.

However, the central aspect of this element of the complaint is not that the Complainant was directed to carry out the works, but rather that the Provider took the unilateral decision to suspend cover pending the completion of the works. In the summary of the complaint furnished to the Provider by this office, the following was one of the questions (Question 10) asked:

> *Please set out the legal and contractual basis for the Provider's suspension of cover under the Complainant's policy, in circumstances where the Complainant argues that the suspension of cover was "wrongful".*
>
> *In responding to this question, please also highlight any Term or Condition that the Provider relies on regarding this decision.*

The response provided was as follows:

> *Please refer to response at Q8 outlining that the premises were unsafe, as per the survey attached.*

The response at Q8 quoted from an email of 22 May 2017 in the following terms:

> *We suspended cover given the nature of the survey and requirements. Where a large number of requirements are immediate and the survey is below standard we will sometimes do this. I would feel it is actually fairer to tell an insured they have no cover for that period rather than letting an incident happen which, given requirement haven't been actioned, they would subsequently find they do not have cover for. In my opinion you are being up front and "brutally" honest about it with them. We referred this back to surveyor after the insured/broker objected and the surveyor confirmed his stance. We then properly reinstated cover, in less than 24 hours, once sufficiently actioned by the insured.*

Later in the response to Q8, the following is set out by the Provider:

> *In the survey, dated 19 May 2016, the independent surveyor identified a range of issues which needed to be addressed immediately, including rectifying noncompliance with policy conditions; there are 27 items identified as requiring immediate attention.*

/Cont'd…

> *Our coverholder's stance generally has been that where there are such a range of issues identified requiring immediate rectification, suspension of policy cover is a sensible option. With 27 items of noncompliance, it was suggested that any claim under the policy would have been unlikely to be accepted. As such the suspension of cover did not dramatically change the practical position on policy cover but did explicitly alert the insured to the seriousness of the situation.*

The response provided at Q8 does not cite any legal or contractual basis for the suspension of cover notwithstanding that the Provider was specifically requested by this office, for this detail in Question 10. Given that the Provider did not answer the specific question during the investigation of the complaint by this office, I reviewed the entire policy in an effort to identify a legal or contractual basis on which the Provider might have justified the suspension of cover. I found no such basis. I am of the view that the Provider was not entitled to unilaterally suspend cover by reference to its perception of what was "*fair*" or "*sensible*".

In my Preliminary Decision I indicated my belief that a contractual basis was required, and that the Provider had clearly failed to identify any such basis in response to direct request, by this office, to do so.

The Provider, in its post Preliminary Decision submission, notes my acceptance that the required repairs were "not unreasonable" but that I then went on to find that:

> *"…the Respondent provided no specific legal or contractual basis for suspending cover pending compliance with the survey requirements"*

The Provider submits that:

> *" In so finding, the Ombudsman rejects the Respondent's submission that:*
>
> *(i) it was entitled to cancel the policy in its entirety due to the breaches identified in the May 2016 risk survey report;*
>
> *(ii) its decision merely to suspend cover was in fact fairer to the Insured than insisting on the strict legal position"*

The Provider's post Preliminary Decision submission goes on to state that:

> *"We regret that the Respondent* [Provider] *did not fully answer the Ombudsman's query, during the investigation process, as to the precise legal and/or contractual basis on which it was entitled to suspend cover. It appears to be that the absence of such an explanation contributed to the Ombudsman's decision to refer this issue to the Regulator".*

/Cont'd…

The Provider submits that:

> *"We set out below a detailed explanation as to the basis on which the Respondent would have been entitled to terminate cover post-survey in May 2016 (particularly in light of the Wiring Representation and/or the 30 day termination terms in the Policy). Ultimately cover was only suspended which was, in practical terms, we suggest, an accommodation to the Insured. We regret that this explanation was not provided at the time".*

The Provider's post Preliminary Decision submission goes on to detail the seriousness of the 'wiring issue' and its entitlement under the policy to cancel cover.

The Provider's submission notes:

> *"When issuing renewal terms for 2015, the covering email from* [name redacted] *of* [redacted] *to the broker dated 27 July 2015 stated:*
>
> *"Terms are subject to confirmation of the following:*
>
> *Due to the age of the building (1945) please advise when the following were last fully re-done:*
>
> - *o Roofing*
> - *o Wiring*
> - *o Plumbing"*
>
> *The broker responded on 5 August 2015, confirming as follows:*
>
> *"Many thanks for the attached. Please note the below information as requested:*
>
> *Due to the age of the building (1945) please advise when the following were last fully re-done:*
>
> - *o Roofing – **10 years***
> - *o Wiring – **2 years***
> - *o Plumbing – **15-20 years***
>
> *I wait your confirmation that all is in order following receipt of the required information".*
>
> *The representation made that the wiring had been fully redone in the past 2 years (**the Wiring Representation**) appears to have been false. The risk survey in May 2016 noted that the electrical system on the premises had not been tested within the past 5 years, with a large number of issues with the system".*

/Cont'd…

The Provider then states that:

> *" The Policy Guide (at page 2 of the Policy document) stated that "This Policy has been issued to you based on the information supplied about yourself your tenants your Business and your Property in the Proposal form and other Material Information declared which forms the basis of the Contract between you and the Insurers".*
>
> *The inaccuracy of the Wiring Representation would, we suggest, have entitled the Respondent to avoid the Policy in May 2016; which would have been far more draconian than the suspension of cover.*
>
> *We suggest, therefore, the Ombudsman's finding that the Insurers acted unreasonably in suspending cover may be challenged when that suspension decision is set against the option of termination which arguably was available under both the Policy's termination provisions and via the common law remedy of avoidance for material misrepresentation.*
>
> *Finally, we would challenge the finding that the decision was unlawful. The suspension of cover, where the option of termination is available, is often used by the courts to mitigate the harshness that an insured would otherwise suffer".*

While the Provider has raised the argument that it would have been entitled to avoid the policy altogether, which it seems it could have, it has still not shown that it held a legal right to suspend the Complainant's policy.

I remain of the view that no legal basis has been shown for the suspension of the policy. While I accept that it could be argued that a decision to suspend cover as opposed to making a policy void, could, in certain circumstances, be considered a fairer option, I consider it reasonable and necessary that a policyholder should be specifically alerted in the contractual provisions, to such a right of the Insurer to suspend cover, should a risk survey show a need for remediation by the insured.

With regard to compensation, I have already observed that the Provider was entitled to demand that certain reasonable works be undertaken and indeed that the Complainant could have refused to undertake those works (however commercially unwise that might have been). Therefore, I do not consider there to be any causative link between the suspension of cover and the expense incurred by the Complainant. I also note that, fortunately, no claims were made during the 17/18-day period of suspension. The suspension was however, in my view not provided for in the terms and conditions, and undoubtedly caused the Complainant a considerable degree of anxiety, distress and inconvenience; indeed, the Complainant seeks to link the events that occurred in and around this time with the subsequent closure of the business in 2018. While I do not believe the Complainant has substantiated any legally sound link with the subsequent closure of the business, I believe compensation is merited for the considerable inconvenience caused by the conduct of the Provider.

/Cont'd…

As I have stated in my Decision, I have serious concerns about the manner in which the Provider sought to deny the Complainant's claim. In particular, I am concerned by the Provider misquoting terms and conditions from the insurance policy, in its correspondence with the Complainant, in a manner that sought to impose a greater onus on the Complainant than the actual wording as contained in the Complainant's policy. The impact of this was to seek to deny the claim based on these incorrect requirements. However, I welcome that the Provider, albeit belatedly on receipt of my Preliminary Decision, acknowledged its errors, provided an explanation for its conduct, outlined the measures taken to avoid a recurrence and indicated its willingness to admit the claim and pay compensation.

Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is substantially upheld, on the grounds prescribed in ***Section 60(2) (a), (b), (e) and (g).***

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to rectify the conduct complained of by admitting the Complainant's claim for assessment. I also direct the Provider to make a payment of compensation to the Complainant in respect of the inconvenience caused in the amount of €20,000 to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

I further direct the Provider to pay all reasonable legal expense already incurred by the Complainant in defence of the claim by the third party.

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

23 December 2020

/Cont'd…

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.