



<u>Decision Ref:</u>	2021-0090
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Household Buildings
<u>Conduct(s) complained of:</u>	Rejection of claim
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns a Home Insurance policy.

The Complainant's Case

The Complainants say that their boundary wall collapsed as a result of heavy machinery working nearby, coupled with adverse weather in the week preceding the collapse of the wall:

"On the 6th November 2018 the boundary wall between my house & our neighbour collapsed..."

...On the proceeding week before the event we had heavy machinery working in very close proximity to the wall scarfing the road behind the house. While the wall did not fail at this date, we had had a substantial rainfall & guests in the following week which along with the severe vibration caused by the road resurfacing caused the wall to collapse."

The Complainants state that when they made a claim on their Home Insurance policy, the Provider asked an engineer to refute their claim:

"The insurance company also asked an engineer to refute our claim..."

The Complainants submit that the cause could not be agreed upon by two professionals, both retained by the Provider:

"In this second report their engineer says that the wall did not fail due to gradual deterioration but to flexing of a tree. I find it unusual that two professionals retained by [the Provider] disagree as to the cause of the wall failure."

They say that

"The [Provider] seems to be going to significant trouble to disallow our legitimate claim"

The Complainants have set out that in settlement of the complaint, they seek:

"To reinstate the party wall my neighbour & myself have agreed that we are jointly involved. Any costs to reinstating the wall will be divided equally between us. I wish only to have my wall reinstated. The approximate value to reinstate the wall is approximately €22,000 divided by the two parties equating to €11,000 exposure for the insurance company."

The Provider's Case

In the Provider's appointed Loss Adjuster's final decline report, dated 24 June 2019 the following is stated:

"[Agent of the Loss Adjuster] is of the opinion that vibration is unlikely to be the cause of failure in this instance.

As you will have read, [Agent of the Loss Adjuster] has concluded that the most probable cause of the wall's failure in this instance is the mechanical flexing of the established tree/shrub...which had grown against (or extremely close to) the wall during a period of moderately high gusting winds"

The Provider, in its Final Response Letter dated **8 February 2019**, reiterated the Loss Adjuster's opinion that the wall did not fall as a result of a storm event:

"There has been no evidence that storm damage caused the wall to collapse and this particular wall was sheltered from the higher ground it was retaining. [Loss Adjuster] are of the opinion that the levels of rain that occurred at that time do not constitute a storm event nor that this level of rainfall would result in structural damage."

The Provider has also confirmed the declinature of the claim under the 'accidental damage section' of the policy.

The Provider says in that regard, that there is no evidence to support a claim under this section:

“The claim was also reviewed under the accidental damage section of your policy however again there is no evidence that any accidental event caused the wall to collapse. We note your comments that in your opinion vibrations from the recent roadworks close to the wall caused it to collapse, however there had been no evidence provided to support your opinion. We are satisfied that the collapse of the wall was not due to a once off event but rather due to gradual deterioration over time.”

The Complaint for Adjudication

The complaint is that the Provider wrongfully declined the Complainants’ claim.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The 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 **24 March 2021**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

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

Policy Terms and Conditions

The Provider relied on the following terms and conditions of the policy:

Section A – Buildings

Meaning of Words

Words with special meanings in this section are defined on pages 10-12

The Cover

<p>What is insured <i>The buildings are insured against loss or damage caused by the events in paragraphs 1 to 11</i></p>	<p>What is not insured</p>
<p>...</p>	<p>...</p>
<p>2. Storm or flood.</p>	<p><i>Loss or damage:</i></p> <ul style="list-style-type: none"> • <i>caused by frost subsidence, ground heave or landslip other than as provided for in section A, paragraph 3 below</i> • <i>to gates, fences or hedges</i> • <i>due to wear and tear or gradual deterioration.</i> • <i>The cost of removing any fallen trees or branches unless the tree or branch has caused damage to the buildings.</i> <p><i>The first €250 of each incident of loss or damage.</i></p>
<p>3. Subsidence or ground heave of the site on which the buildings stand or landslip</p>	<p><i>Loss or damage in respect of apartment blocks (purpose built or converted).</i></p> <p><i>Loss or Damage:</i></p> <ul style="list-style-type: none"> • <i>caused by settlement due to building load, bedding down, coastal, lake or river erosion, structural alterations or repairs or demolition, defective design and/or construction, defective or inappropriate foundations and the use of faulty materials.</i> • <i>caused by building on made-up ground or filled-in land</i> • <i>to walls, gates fences, hedges, terraces, patios, drives, paths, tennis</i>

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	<p><i>hard courts unless liability is admitted under the policy for loss or damage to the home from the same cause occurring at the same time</i></p> <ul style="list-style-type: none"> • ... • <i>Associated with such causes arising prior to the payment of premiums for the period of insurance in which a claim may arise.</i>
...	...
<p>18. Extended accidental damage. <i>The buildings are insured against any accidental damage in addition to the events under paragraphs 1 to 14 of this section.</i></p>	<p>Loss or Damage:</p> <ul style="list-style-type: none"> • <i>caused by wear and tear or gradual deterioration, insects, vermin, corrosion, rot, mildew, fungus, atmospheric conditions, the action of light, any process of heating, drying, cleaning, decorating, alteration or repair, misuse, faulty workmanship or design, the use of faulty material, or breakdown</i> • <i>caused by chewing, scratching, tearing or fouling of domestic pets</i> <p><i>Any loss, damage or amount shown as not insured under paragraphs 1 to 14 of this section.</i></p> <p><i>The first €250 of each incident of loss or damage.</i></p>

The policy also provides certain definitions for certain words as follows:

Buildings

*The **home**, landlord's fixtures and fittings on or in the **home**, walls, gates, fences, hedges, terraces, patios, drives, paths, tennis hard courts and swimming pools, all at the situation of the **premises** shown in the schedule.*

Flood

(a) The escape of water from the normal confines of any natural or artificial water course (other than water tanks, apparatus or pipes) or lake, reservoir, canal or dam

or

(b) Inundation from the sea

Whether resulting from storm or otherwise.

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Ground heave

The upwards expansion of the ground resulting in damage to the buildings foundations.

Home

*The private dwelling, garage and **out-buildings** used for domestic purposes only, all at the situation of the **premises** shown in the schedule.*

Subsidence

The downward movement within the ground independent of the building load.

Analysis

This complaint arises from a claim made by the Complainants on their Home Insurance policy on **08 November 2018** following the collapse of the Complainants' boundary wall on 06 November 2018.

A 'First Contact' form supplied in evidence by the Provider records that the Complainants' agent advised, in the course of a phone call on **08 November 2018**, that the claim "*related to a shared boundary wall which collapsed due to torrential rain which weakened the wall*". A phone recording of a phone call of 08 November 2018, confirms that the claim was opened on the basis that the perimeter wall "*collapsed due to a rainstorm*".

The Provider arranged for the attendance of its Loss Adjustor at the Complainants' home, following which the Provider's Loss Adjustor wrote to the Complainants' Loss Assessor on **30 November 2018** rejecting the claim. This letter provided as follows:

Following our inspection of the damage to the shared boundary wall and consideration of the circumstances surrounding this incident we do not accept that the wall collapsed as a result of a storm event and / or an accident resulting from nearby road resurfacing works.

We are satisfied that the collapsed wall was unfit to act as a retaining wall with no support to counteract the hydrostatic pressure gradually exerted from the neighbour's higher ground and root action which became visible when the wall collapsed as per the photographs below.

Under the terms of your Client's policy, gradual damage is excluded as per the following Storm and Accidental Damage policy wording provided hereunder:-

...

Furthermore, we can confirm having reviewed the Met Eireann records for the date of loss and note that no Storm winds were recorded. In addition to this, it must also be acknowledged that the wall in question was sheltered from the higher ground it was retaining. In summary, there is no admissible storm peril / weather event that the policy can respond to herein and furthermore, we found no evidence to support an accidental or extraneous event (sic) that would support a claim under the AD section of the policy.

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The First Complainant responded to this correspondence by way of letter dated **11 December 2018** insisting (with the assistance of pre-loss photographs) that the wall, which had been standing for “over 70 years”, was “well-maintained” and in “good condition” prior to the collapse.

The letter stated that “the cause of the wall collapse was a combination of the major road works on the week preceding the event & the inclement weather over the preceding month”. The First Complainant concluded that the “claim is the result of significant vibration action from the proximity road works & not from gradual deterioration of the structure, nor an inadequate construction”.

In response to the First Complainant’s letter of 11 December 2018, the Provider requested the Complainants to furnish an engineer’s report. Thereafter, the Complainants appear to have procured a one-page letter addressed to them from an engineer dated **24 January 2019** which, having noted that the wall was built “in excess of fifty years ago” and that it was “in reasonable condition prior the collapse”, stated as follows:

We would contend that storm conditions existed prior to the collapse as there was significantly higher than normal rainfall and gusting winds recorded at the nearby Met Éireann weather station at [location] Airport. Furthermore, large scarifying machinery were working in close proximity to the collapsed wall with significant vibration being felt by you in your home and by your neighbor on the evening prior to the collapse. There is no evidence that root action played a part in the collapse. Evidence of scarifying damage to the concrete road kerbs is to be seen on [redacted] Road. In our opinion the storm conditions together with the vibration caused by the heavy machinery led to the collapse of the wall.

It would appear that the Provider was not yet in receipt of the Complainants’ Engineer’s letter of 24 January 2019 when it issued a letter dated **08 February 2019** (the engineer’s letter was sent by the First Complainant on the same day) standing over its rejection of the claim and citing the following rationale:

[The Provider’s Loss Adjuster] inspected the wall and following a review of the evidence they declined your claim. It is their professional opinion that the wall in question, notwithstanding its age, was unfit for purpose and was always destined to eventually collapse under the hydrostatic pressure exerted by your neighbour’s higher ground. The blocks are placed on their edge which is not adequate as a retaining wall and there are no supporting piers.

There has been no evidence that storm damage caused the wall to collapse and this particular wall was sheltered from the higher ground it was retaining. [The Provider’s Loss Adjuster] are of the opinion that the levels of rain that occurred at the time do not constitute a storm event nor that this level of rainfall would result in structural damage.

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The claim was also reviewed under the accidental damage section of your policy however again there is no evidence that any accidental event caused the wall to collapse. We note your comments that in your opinion vibrations from the recent roadworks close to the wall caused it to collapse, however there has been no evidence provided to support your opinion. We are satisfied that the collapse of the wall was not due to a once-off event but rather due to gradual deterioration over time.

Following receipt of your complaint, [the Provider's Loss Adjuster] have written to you asking that you provide an engineer's report outlining the cause of the wall's collapse, details of the cost of repair on a without prejudice basis, and confirmation on whether a complaint was made to the local council regarding the roadworks that you have alleged caused the road to collapse. Upon receipt of these items the matter will be reviewed further.

Subsequent to the letter of **08 February 2019**, and subsequent to the Provider's receipt of the Complainants' engineer's letter of *24 January 2019*, the Provider's Loss Adjuster commissioned an 'Engineering Report'. A 'draft' report (running to 15 substantive pages together with 18 pages of appendices) was produced based on an inspection carried out on **11 March 2019** and this report was supplied to the Complainants. The author of this report had sight of the First Complainant's letter of 11 December 2018, and of the Complainants' engineer's letter of 24 January 2019.

The Provider's Engineering Report notes that the First Complainant's letter of 11 December 2018 "*highlighted*" weather data for the month of November 2018 and comments that this is of limited use given that the incident had occurred early in the month (06 November). Whilst I am not convinced that the First Complainant did 'highlight' the weather data for the month of November in his letter of 11 December 2018 (he in fact refers to "*the inclement weather over the preceding month*"), it is certainly the case that the relevant data includes the weather on the day of the incident and leading up to the incident.

In this regard, the Provider's Engineering Report notes, by reference to Met Eireann records which he reproduced in his report, that rainfall in October 2018 was "*very low compared to relative norms*". With regard to the day of the incident, the Provider's Engineering Report conceded that this was "*a wet day*" (there were 21.3mm of rain recorded) but states that it was not exceptionally wet, noting that days with more rainfall happened approximately 10 times per year in the preceding 30 years. The days immediately preceding 06 November had significantly lower rainfall.

I note that, with regard to wind, the Provider's Engineering Report notes that "*the mean wind speed on the day of failure at 10.5 Knotts was low*". The report went on to note that the maximum gust recorded on the day (43 Knotts) was documented to have occurred, or been outstripped, approximately 24 times per year for each of the preceding 30 years. On the basis of the foregoing, the Provider's Engineering Report concluded that weather events were not to blame for the collapse.

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I also note, with regard to the Complainants' contention that vibration caused the collapse, that the Provider's Engineering Report, while noting "*some correlation in timing between these road works and the wall failure*", goes on to state that typically

"where an element fails or is affected by vibration, the manifestation of that failure is instant and co-incidental with the applied vibration."

In the circumstances of the Complainants' claim, the report concludes that, as "*the vibration was associated with works undertaken in the week preceding the failure*", and as the damage did not manifest in the wall located closest to area where the road works were taking place ("*a less robust structure*") and as the "*centre of the failure event appears to be located more than 10m from the boundary wall*" (meaning that any vibration forces must have been subject to significant 'attenuation'), "*vibration is unlikely to have been the primary cause of failure*".

The Provider's Engineering Report deduced that the construction of the wall was

"deficient when compared with the acceptable and normal building standards at the time of its construction and the more modern code of practice adopted in 1951"

and that a contributory cause of the wall's collapse was "*normal age-related deterioration on the permeability of the retained soil*". The report concludes that

"the most probable cause of failure in this instance is the mechanical flexing of the established tree/shrub ... which had grown against (or extremely close to) the wall during a period of moderately high winds."

Subsequent correspondence from the First Complainant to the Provider dated **17 May 2019** highlighted that the wind speed of 43 Knotts referenced in the Provider's Engineering Report "*is reason for a status orange weather report*". The First Complainant wrote again by letter dated 27 May 2019 to the Provider's Loss Adjuster (the letter appears to have been received on 8 July 2019) pointing out that the Provider's Loss adjustor and its engineer, differed on the proximate cause of the collapse. This letter reiterated the First Complainant's view that weather and vibration caused the collapse. A further letter was sent by the First Complainant dated **10 June 2019** to the Provider's Loss Adjuster refuting that the damage was the result of gradual deterioration and again pointing out that the Provider's Loss adjustor and its engineer differed on the proximate cause of the collapse.

The Provider's Loss Adjuster responded to the Complainants' letters of 17 May 2019 and 10 June 2019, by way of letter of 24 June 2019 reiterating that the weather on the day did not amount to an "*extraordinary event*" and noting that wind speed of 43 Knotts "*would not be classified as a storm*" by reference to the Beaufort Scale of Wind Force. The Provider's Engineering Report findings as regards vibration were also restated following which it was set out that the damage suffered did not "*relate to any contingency which is covered by the policy*".

The foregoing represents a summary of the relevant communications exchanged between the Complainants and the Provider in relation to the claim. It should be noted that the function of this Office is not to determine what was or was not the proximate cause of the damage suffered by the Complainants. Rather, the function of this Office is to determine whether the conduct of the Provider was wrongful in a way which falls within the grounds outlined at **Section 60(2)** of the **Financial Services and Pensions Ombudsman Act 2017**, which would ground a decision to uphold the Complainants' complaint.

The Complainants in this case have posited two primary causes for the collapse of the wall, both of which, they contend, constitute insured perils. In the first place, they state that the wall "*collapsed due to a rainstorm*", "*due to torrential rain*", due to "*the inclement weather over the preceding month*", and due to "*storm conditions*". I am not satisfied in that regard, that "*inclement weather over the preceding month*", constitutes a peril covered by the policy. The only relevant cover provided for in the policy is to be found in Section 2A – 'Storm or Flood'. I am satisfied that adverse ('inclement') weather conditions over an extended period leading up to a loss, is not covered under the policy. What is covered is a storm event which I am satisfied is a single discrete weather event and there is no evidence of any such event in this instance. Indeed, per the Met Éireann records, the weather in "*the preceding month*" was largely fine with unusually low rainfall levels.

In order to make a successful claim under '**Section 2A – Storm or Flood**', I am satisfied that the Complainants would have had to have shown that the loss was the result of a storm (it being accepted that there was no flood event in this instance.) In support of their claim, the Complainants have advanced their own views and that of their engineer. The latter concluded "*that storm conditions existed prior to the collapse as there was significantly higher than normal rainfall and gusting winds recorded at the nearby Met Éireann weather station at [location] Airport*" and that "*the storm conditions together with the vibration caused by the heavy machinery led to the collapse of the wall*". The passages quoted above comprises the entirety of the Complainants' engineer's reasoning on the issue.

In response to the Complainants' engineer's submission, the Provider commissioned an engineer's report which responded in detail on this issue. The Provider's engineer's report reproduced data from the local weather station for the period in question, thereby refuting the claim that the weather conditions present on the day amounted to a storm.

I am satisfied that it was reasonable for the Provider's engineer to rely on the Beaufort Scale of Wind Force in reaching his conclusions. I am also satisfied that the Provider's engineer demonstrated that there was no extraordinary weather event such as might otherwise have led to the weather conditions being capable of description as a storm. In circumstances where the Provider had been furnished with this detailed opinion which was not subsequently challenged by any further expert evidence provided by the Complainants, and in circumstances where the Complainants' engineer addressed the matter only in a very brief manner and without citing empirical data, I am satisfied that the Provider was entitled to conclude that the peril at 'Section 2A – Storm or Flood' was not activated or triggered.

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The second matter suggested by the Complainants as a primary cause for the collapse was the vibration caused by the roadworks carried out during the week prior to the collapse. It is claimed that this qualifies as 'accidental damage' under the policy. Whilst this was not a ground initially relied upon by the Complainants when the claim was originally made, it was certainly mentioned to the Provider's Loss Adjuster in the course of his initial attendance at the Complainants' home. This ground was also addressed by the Complainants' engineer who stated that *"large scarifying machinery were working in close proximity to the collapsed wall with significant vibration being felt by you in your home and by your neighbor on the evening prior to the collapse... Evidence of scarifying damage to the concrete road kerbs is to be seen on [redacted] Road"*. He then concluded that *"the storm conditions together with the vibration caused by the heavy machinery led to the collapse of the wall"*. The passages quoted above comprise the entirety of the Complainants' engineer's reasoning on the issue.

This issue was also addressed by the Provider's engineer who set out a detailed analysis in discounting vibration as a proximate cause of the collapse. This reasoning included the period between the vibration event and the collapse, the fact that a less robust wall closer to the vibration event did not appear to have suffered damage, and the fact that the *"centre of the failure event appears to be located more than 10m from the boundary wall"*. This latter point was deemed significant for two reasons. In the first part, the area of the wall that initially failed ('the centre of the failure') was further away from the vibration event than large parts of the same wall.

Secondly, the distance between the 'the centre of the failure' and the vibration event (over 10m) meant that large parts of the force of the vibration would have dissipated or *"attenuated"*. This latter point was supported by a graph and mathematical calculations.

In circumstances where the Provider had been supplied with this detailed opinion which was not subsequently challenged by any further expert evidence provided by the Complainants, and given that the Complainants' engineer addressed the matter only in a very brief manner, I am satisfied that the Provider was entitled to conclude that the accidental damage section of the policy, was not activated or triggered.

The Complainants take issue with the fact that the Provider's loss adjuster and engineer appear to disagree on the proximate cause of the collapse. I am not satisfied that the respective opinions are entirely inconsistent, insofar as both offer the opinion that the defective design/construction of the wall was a contributory factor in its collapse. However, as noted above, it is not the function of this Office to come to any definitive determination regarding the proximate cause of the collapse. The Complainants have invoked two sections of the policy. I am satisfied that the Provider was entitled to reject the claim made invoking those sections, based on the expert opinion it had to hand and that, in doing so, I accept that it acted reasonably.

In light of the entirety of the foregoing, and in the absence of evidence of wrongdoing by the Provider or conduct falling within the terms of **Section 60(2)** of the **Financial Services and Pensions Ombudsman Act 2017** that could ground a finding in favour of the Complainants, I am not in a position to uphold the complaint.

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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 rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



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

19 April 2021

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.