An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0094
Sector:	Insurance
Product / Service:	Household Buildings
Conduct(s) complained of:	Poor wording/ambiguity of policy Failure to provide product/service information Failure to process instructions
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainants incepted a home insurance policy with the Provider on **18 October 2010**. The policy period in which this complaint falls, is from 24 July 2015 to 23 July 2016, when the buildings sum insured was listed as €200,000.

The Complainants' Case

The Complainants set out their complaint in the Complaint Form they completed, as follows:

> *"We suffered an escape of water leading to undermining of foundations at our property and a figure of €173,474.70 was agreed with* [the Provider] *in terms of the reinstatement works. However,* [the Provider] *applied the under-insurance or "Average" clause as follows:*
>
> > *Sum Insured €200,000*
> > *Value at Risk €251,500 x loss €173,474.70 = €137,975.04*
>
> *We therefore suffered an "uninsured" loss of €35,522.66 and this loss is the reason we are submitting a complaint …*
>
> *Our view is that the Policy is not subject to "Average".*
>
> *The loss was discovered in December 2015 but was ongoing prior to that due to the fact that water was escaping on a gradual basis …*

The reference to Condition of Average [in the 'General Policy Conditions' of the Home Policy Document (June 2012)] *states that "whenever a sum insured is declared to be subject to Average" etc. then the Insured shall bear a rateable share of the loss accordingly.*

However, this wording clearly indicates that the sum insured has to be specifically noted as being subject to "Average" i.e. "declared", but there is no such indication on the [Policy] *Schedule i.e. there is no declaration of the Schedule indicating the building sum insured is subject to "Average"*.

When we pointed this out to [the Provider] *we received a response from them on the 12th December 2018…They suggested that the wording of the Home Multi-Peril Policy which was in place from June 2012 was subsequently replaced with another version which was clearer than the previous version in that it was changed to a "plain English" version. It states that a letter on 17th June 2015 was issued to* [its] *Policyholders outlining the changes. Notwithstanding that we don't accept that the "plain English" version clarifies the matter in any greater detail, we did a* [trawl] *of our files and emails…of all notices received from* [the Provider] *during that period which clearly does not include referenced letter of 17th June 2015 or indeed receiving an amended wording.*

When a drains test was carried out it was noted there was a significant escape of water from the gully near the extension. It was evident this was leaking for some time which would dictate that the date of loss and indeed the cause preceded any changes [the Provider] *made on the Policy so that the old wording applies, given these type of claims are dealt with on a "time on risk basis", usually over circa 4 years prior to discovery of the damage. In other words if our Policy was taken out or incepted one year prior to discovery,* [the Provider] *would only have dealt with quarter of our claim.*

The period of insurance on the Schedule is indicated 24th July 2015 to 23rd July 2016. This is evidence of the contract for that period so there is little doubt this Schedule was applicable/relevant in terms of the loss date December 2015 and any argument from [the Provider] *that the terms and conditions were amended by virtue of a letter issued on 17th June 2015 (which we didn't get) is a complete non-runner.*

In summary the position is as follows:

1. *Agreed claim was reduced by €35,522 due to* [Provider] *applying Average.*

2. *We argue* [the Provider] *are precluded from applying Average as the Policy clearly states that there needs to be specific reference on the Schedule to Average i.e. "whenever a sum insured is declared to be subject to Average"*

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3. [The Provider] *suggest that an amendment was made to their Policy wording on 17th June 2015. We have no evidence of receiving this letter and in any event, we suggest the letter does not make the matter any clearer.*

4. *Notwithstanding* [the Provider's] *argument that a letter was issued changing the wording, these claims are dealt with on a "time on risk" basis so that the loss was ongoing for at least four years prior to discovery which clearly preceded any change* [the Provider] *made to the wording which completely removes their argument/defence.*

5. *Notwithstanding the foregoing there is clear ambiguity in the context of the Schedule as issued to us and indeed in the context of the Policy wording and it is our understanding that any ambiguity is construed in favour of the Policyholder at all given that* [the Provider] *drafted/prepared the wording and associated schedule"*.

The Complainants' complaint is that the Provider wrongly assessed the Complainants' home insurance claim, insofar as it applied the average clause to the claim settlement amount offered.

The Provider's Case

Provider records indicate that the Complainants incepted a home insurance policy with the Provider on **18 October 2010**. The policy period in which this complaint falls, is from 24 July 2015 to 23 July 2016, when the buildings sum insured, was listed as €200,000.

The Provider says that on 3 February 2016, the Complainants notified it of a claim relating to subsidence at their property, with the date of loss recorded as 30 December 2015. The Provider-appointed Loss Adjuster first attended for inspection on **15 February 2016**.

Following consultations between the parties, the Loss Adjuster issued a formal offer to the Complainants on **29 May 2019**, which was accepted on **7 June 2019**.

The Final Report of the Loss Adjuster dated 12 June 2019 states:

> *"*[The Complainant's] *Engineer…submitted an estimate for building repairs in the amount of €180,536.65 which was supported by an estimate from* [a Construction Firm]. *Further amounts were sought for professional/supervisory/design fees which produced a total Buildings claim of* ***€213,709.13*** *as detailed in the table below.*
> *Following consultations between the respective Engineers, it was eventually agreed that due to the degree of movement, the most appropriate method of repair was the installation of a piled raft, throughout the ground floor of the house, with the raft to be supported by 39 piles. To facilitate same, the floors throughout the ground floor will need to be excavated and reinstated. Once the scope of the claim was agreed, adjustments were required to reflect overstatement in quantum and we calculated a total cost of repairs of* ***€173,474.70*** *to include temporary storage of contents for a period of six months …*

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ADEQUACY OF SUMS INSURED

The Building sums insured was inadequate and we calculated the value at risk as follows:

161sq. m. @ €1,500=	*€241,500*
Outbuildings, etc.	*€10,000*
Total	***€251,500*** *…*

SUMMARY

Settlement of this loss has been agreed per a signed acceptance form, as follows:

Buildings	*€137,952.04*
Alternative Accommodation	*€10,000.00*
	€147,952.04
Less Policy Excess	*€1,000.00*
Amount Due	***€146,952.04***

We now recommend that your payment of €146,952.04 is issued to the insured in full and final settlement of this loss".

The Provider is satisfied that the Complainants' home insurance claim was assessed correctly. In this regard, the Provider notes that the Complainants had insured their buildings for the sum of €200,000, however as part of its assessment its Loss Adjuster calculated the value at risk to be €251,500. As the property was therefore underinsured, the Condition of Average clause was applied to the claim settlement amount offered, in accordance with the home insurance policy terms and conditions

The Provider says that its records indicate that it posted the '**Your Home Insurance Policy Document**' (May 2014) to the Complainants on **17 June 2015**.

The '***How we will settle your claim***' section of this Policy Document states at pg. 8:

*"**Underinsurance***

You are underinsured if the full cost of rebuilding the buildings plus the cost of removing debris after a loss, professional fees and any additional costs necessary to meet current building regulations or the cost of replacing the contents at the time of loss or damage, is more than the sums insured as noted in your schedule.

If you are underinsured, the Condition of Average will apply as outlined under Condition 1 of the general conditions of the policy".

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The Provider points also, in this regard, to the '**General conditions of the policy'** section of this Policy Document which provides at pg. 12:

> *"You or any other person claiming under this policy must comply with the following general policy conditions to avail of the full protection provided by the policy. If you or any other person claiming under this policy does not comply with them, we may cancel the policy or refuse to deal with your claim or reduce the amount of any claim payment.*
>
> ***1. You must keep your sums insured at the correct level***
>
> *You must at all times keep your sums insured at a level that is the full value of your buildings and contents. The buildings sum insured must also include the costs of removing debris after a loss, professional fees and any additional costs necessary to meet current building regulations.*
>
> *The full value on buildings means the estimated cost of rebuilding the buildings if they were completely destroyed.*
>
> *The full value on contents means their current replacement cost as new.*
>
> ***Condition of Average***
>
> *This policy is subject to a condition called Average. This means that you need to insure the full value of the buildings and contents and that claims settlements may be reduced if the sum insured, at the time of any loss or damage, are less than the full value.*
>
> *If a sum insured, as noted on the schedule, is less than the full value of the buildings or contents at the time loss or damage occurs, then the insured person shall be responsible for a part of their loss.*
>
> *Insurers will only pay the part of the loss which the sum insured bears to the full value of the insured item. For example, if the full value of an insured building is €200,000 and the sum insured is €150,000 then insurers would pay only 75% of any loss or damage".*

The Provider says, in addition, that on **26 June 2015**, prior to the renewal date of 24 July 2015, the Provider issued the Complainants with the Renewal Notice, which stated:

> *"Before you renew, please check that the sums insured are adequate to cover current replacement costs".*

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The Provider also says that the enclosed '**You home insurance policy: Features & benefits'** document provided at pg. 3, as follows:

> *"**What else do I need to know?***
>
> ***Condition of Average***
>
> *You need to carefully consider and regularly review the sum insured on your buildings and contents.*
>
> ***Building**s – The sum insured should be the full cost of rebuilding all items that make up the buildings as new. This is not the same as market value of your buildings. The sum insured should also include an amount for architect fees, compliance with building regulations and debris removal. For information on rebuilding costs visit the Society of Chartered Surveyors website www.scs.ie ….*
>
> *If your sums insured are below the full cost, the Condition of Average will apply which means we will only pay a proportion of your claim based on the difference between the sum insured and the actual replacement costs"*.

The Provider notes that the Renewal Features and Benefits documents which were enclosed with the Complainants' 2013 and 2014 Renewal Notices, also made clear reference to checking the adequacy of the sums insured and to underinsurance.

In addition, the Provider notes that the home insurance policy document that was in effect when the Complainants incepted their policy on **18 October 2010** also allowed for the average clause to be applied to the buildings sum insured in circumstances of underinsurance. In this regard, the '**How we will settle your claim'** section of the Home Policy Document (January 2010) stated at pg. 10:

> *"**Under Insurance***
>
> *You are underinsured if the cost of rebuilding the Buildings or the cost of replacing the Contents at the time of loss or damage is more than your declared Sum Insured for Buildings and Contents as they appear on your Policy Schedule.*
>
> *If you are underinsured, we will only pay a proportion of your claim based upon the proportional relationship between your declared Sums Insured for Buildings and Contents and the cost of rebuilding the Buildings or the cost of replacing the Contents at the time of loss or damage respectively (Refer to the Condition of Average under General Policy Conditions Number 1.)"*.

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The Provider refers to the '**General Policy Conditions'** section of the Home Policy Document (January 2010) which stated at pg. 5:

> *"You and or any person claiming benefit under this policy must comply with the following General Policy Conditions in order to avail of the full protection provided under the Policy. If you (or any other Person claiming benefit under this Policy) does not comply with them, we may cancel the Policy or refuse to deal with your claim or reduce the amount of any claim payment.*
>
> 1. ***Keep Sums Insured at correct level:*** *You must at all times keep Sums Insured at a level that represents the full value of the Property Insured (including the costs of removing debris after a loss and any additional costs necessary to meet current Building Regulations).*
>
>   *For the Buildings, Full value shall represent the estimated cost of rebuilding the Buildings if they were completely destroyed …*
>
>   *The Policy is subject to a condition of Average whereby claims settlement may be reduced if the Sums Insured are less than the full value at the time of any loss or damage:*
>
> ***CONDITION OF AVERAGE:*** *Whenever a sum insured is declared to be subject to average, if the property covered thereby shall at the breaking out of any fire or the commencement of any destruction of or damage to such property by any other peril hereby insured against be collectively of greater value than the Sum Insured which appears on the Policy Schedule, then the Insured shall be considered as being his/her own insurer for the difference and shall bear a rateable share of the loss accordingly".*

The Provider notes that the subsequent Home Policy Document (June 2012) included the exact policy wording as above. Accordingly, the Provider is satisfied that it correctly assessed the Complainants' claim in accordance with the terms and conditions of their home insurance policy.

The Complaint for Adjudication

The complaint is that the Provider wrongly assessed the Complainants' home insurance claim, insofar as it applied the average clause to the claim settlement amount offered.

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.

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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 **25 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.

The Complainants held a home insurance policy with the Provider. The policy period from which this complaint arises, is from 24 July 2015 to 23 July 2016, when the buildings sum insured was listed as €200,000.

I note on **3 February 2016** that the Complainants advised the Provider of a claim relating to subsidence at their property, with the date of loss recorded as 30 December 2015. I note that the Provider-appointed Loss Adjuster first attended the property for inspection on 15 February 2016 and that as part of its assessment, the Loss Adjuster determined that the value of the buildings at risk was €251,500. As the Complainants' buildings sum insured was €200,000, the buildings were underinsured and the Provider applied the Condition of Average to the claim settlement amount offered.

The Complainants, however, submit that the terms and conditions of their home insurance policy do not allow for the Condition of Average to be applied to a buildings claim.

I note that the Provider wrote to the Complainants on **21 July 2015**, as follows:

> *"Please find attached your policy schedule which sets out your sums insured and cover. You should read this in connection with your policy document.*
>
> *Please check that the details are correct and meet your needs"*.

I note that the attached policy schedule detailed the buildings sum insured for the period 24 July 2015 to 23 July 2016, as **€200,000**.

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I also note that, at the time in July 2015, the enclosed '**You home insurance policy: Features & benefits**' document made the following information clear at pg. 3, as follows:

> *"**What else do I need to know?***
>
> ***Condition of Average***
>
> *You need to carefully consider and regularly review the sum insured on your buildings and contents.*
>
> ***Building**s – The sum insured should be the full cost of rebuilding all items that make up the buildings as new. This is not the same as the market value of your buildings. The sum insured should also include an amount for architect fees, compliance with building regulations and debris removal. For information on rebuilding costs visit the Society of Chartered Surveyors website www.scs.ie ….*
>
> *If your sums insured are below the full cost, the Condition of Average will apply which means we will only pay a proportion of your claim based on the difference between the sum insured and the actual replacement costs".*

It is important to note that the Complainants' home insurance policy, like all insurance policies, did not provide cover for every possible eventuality; rather the cover was subject to the terms, conditions, endorsements and exclusions set out in the policy documentation.

I note from the documentation before me that the Provider wrote to the Complainants on 17 June 2015:

> *"Our new plain English home policy wording is enclosed and we recommend that you read it in full as it will form the basis of your cover from renewal. Your renewal details will follow shortly".*

The '*How we will settle your claim*' section of the enclosed **Your Home Insurance Policy Document** (May 2014) states at pg. 8:

> *"**Underinsurance***
>
> *You are underinsured if the full cost of rebuilding the buildings plus the cost of removing debris after a loss, professional fees and any additional costs necessary to meet current building regulations or the cost of replacing the contents at the time of loss or damage, is more than the sums insured as noted in your schedule.*
>
> *If you are underinsured, the Condition of Average will apply as outlined under Condition 1 of the general conditions of the policy".*

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In this regard, I note that the '**General conditions of the policy'** section of this Policy Document provided at pg. 12:

> *"You or any other person claiming under this policy must comply with the following general policy conditions to avail of the full protection provided by the policy. If you or any other person claiming under this policy does not comply with them, we may cancel the policy or refuse to deal with your claim or reduce the amount of any claim payment.*
>
> ***1. You must keep your sums insured at the correct level***
>
> *You must at all times keep your sums insured at a level that is the full value of your buildings and contents. The buildings sum insured must also include the costs of removing debris after a loss, professional fees and any additional costs necessary to meet current building regulations.*
>
> *The full value on buildings means the estimated cost of rebuilding the buildings if they were completely destroyed.*
>
> *The full value on contents means their current replacement cost as new.*
>
> ***Condition of Average***
>
> *This policy is subject to a condition called Average. This means that you need to insure the full value of the buildings and contents and that claims settlements may be reduced if the sum insured, at the time of any loss or damage, are less than the full value.*
>
> *If a sum insured, as noted on the schedule, is less than the full value of the buildings or contents at the time loss or damage occurs, then the insured person shall be responsible for a part of their loss.*
>
> *Insurers will only pay the part of the loss which the sum insured bears to the full value of the insured item. For example, if the full value of an insured building is €200,000 and the sum insured is €150,000 then insurers would pay only 75% of any loss or damage".*

I am therefore satisfied that the applicable home insurance policy terms and conditions clearly stated that the policy was subject to the Condition of Average, which would apply to any claim settlement amount offered, where the value at risk was underinsured.

The Complainants say that they did not receive the May 2014 policy document that the Provider says it posted to them on 17 June 2015. They instead refer to the earlier Home Policy Document (June 2012) and in this regard, the Complainants state in their Complaint Form they completed, as follows:

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> *"The reference to Condition of Average* [in the 'General Policy Conditions' of the Home Policy Document (June 2012)] *states that "whenever a sum insured is declared to be subject to Average" etc. then the Insured shall bear a rateable share of the loss accordingly.*
>
> *However, this wording clearly indicates that the sum insured has to be specifically noted as being subject to "Average" i.e. "declared", but there is no such indication on the* [Policy] *Schedule i.e. there is no declaration of the Schedule indicating the building sum insured is subject to "Average"*."

Notwithstanding this argument, I am satisfied that the home insurance terms and conditions that correctly apply to the claim the Complainants notified to the Provider on 3 February 2016, are those contained in the **Your Home Insurance Policy Document (May 2014)** that the Provider advises it posted to the Complainants on 17 June 2015. For completeness, I note however, that the 'General Policy Conditions' section of the earlier Home Policy Document (June 2012) referred to by the Complainants in the Complaint Form stated at pg. 6:

> *"**1. Keep Sums Insured at correct level:** You must at all times keep Sums Insured at a level that represents the full value of the Property Insured (including the costs of removing debris after a loss and any additional costs necessary to meet current Building Regulations).*
>
> *For the Buildings, Full value shall represent the estimated cost of rebuilding the Buildings if they were completely destroyed …*
>
> *The Policy is subject to a condition of Average whereby claims settlement may be reduced if the Sums Insured are less than the full value at the time of any loss or damage:*
>
> ***CONDITION OF AVERAGE:** Whenever a sum insured is declared to be subject to average, if the property covered thereby shall at the breaking out of any fire or the commencement of any destruction of or damage to such property by any other peril hereby insured against be collectively of greater value than the Sum Insured which appears on the Policy Schedule, then the Insured shall be considered as being his/her own insurer for the difference and shall bear a rateable share of the loss accordingly".*

The Complainants contend that the wording *"Whenever a sum insured is declared to be subject to average …"* implies that the Condition of Average can only apply, for example, to the buildings sum insured, if it is specifically stated on the Policy Schedule that the buildings sum insured is subject to the Condition of Average.

However, I am satisfied that the preceding sentence clearly indicates that the Condition of Average will apply to all sums insured, as follows:

> *"The Policy is subject to a condition of Average whereby claims settlement may be reduced if the Sums Insured are less than the full value at the time of any loss or damage"*.

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In addition, I take the view that the phrase *"Whenever a sum insured is declared to be subject to average …"* simply means that where, in the course of a claim assessment, it is found that the sum insured is lower than the value at risk, it is therefore subject to the Condition of Average.

Although the home insurance policy terms and conditions that apply to the claim which the Complainants notified to the Provider on 3 February 2016, are those contained in the Your Home Insurance Policy Document (May 2014), I have, for completeness, also considered the corresponding provisions contained in both the Home Policy Document (January 2010), which was the policy document in effect when the Complainants incepted their home insurance policy with the Provider in October 2010, and the subsequent Home Policy Document (June 2012). Having done so, I am satisfied that all three make clear the importance of keeping the sums insured at the correct level and the consequences of any failure to do so, by way of the application of the Condition of Average.

Accordingly, I am of the opinion, given the evidence made available by the parties, that there is no reasonable basis upon which it would be appropriate to uphold this complaint. I note that on 6 June 2019, the Complainants agreed settlement of the claim in the sum of €146,952.04, in full satisfaction. I am satisfied on the evidence that the Provider's calculation of that figure was not in any way rendered inappropriate because of the application of the average clause, referred to in the parties' contractual arrangements.

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

20 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.

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