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| <u>Decision Ref:</u> | 2021-0238 |
| <u>Sector:</u> | Insurance |
| <u>Product / Service:</u> | Household Buildings |
| <u>Conduct(s) complained of:</u> | Rejection of claim - freezing or escape of or overflow of water or oil |
| <u>Outcome:</u> | Rejected |

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns a claim made on a household insurance policy.

The Complainant's Case

The Complainant is a landlord of a semi-detached, two-storey, property dwelling which is divided into two rental units, 'unit' and 'unit a'. *"On or about 7th January 2010 [the Complainant's] tenant ['Mr M'] discovered a burst water pipe"* at the property at unit. The Complainant submits in evidence an affidavit from Mr M in which Mr M asserts that he [Mr M] signed a lease for the property at unit on **4 January 2010** and was in possession of the property at the time the pipes in the property burst, at which point he phoned the Complainant and *"informed him that water was pouring down from the attic and flooding the house. The [Complainant] sent up a plumber to the house and turned off the water"*.

The Provider states that it was informed on **12 January 2010** by 'Mr. LH', the Complainant's loss assessor, of the damage as a result of a *"burst water pipe"*. The Provider says that *"in line with [its] normal procedures"* it appointed an independent firm of Loss Adjusters to *"handle the claim on [its] behalf"*, and the Provider's Loss Adjuster carried out an inspection of the property on **14 January 2010** with the Complainant and the Complainant's representative Mr. LH in attendance and a third person who was, at a later date, identified by the Complainant as the tenant Mr M.

According to the Provider, in **November 2010** the Provider's Loss Adjuster instructed it to close the file as '*despite a number of reminders [the Complainant] had not provided the full documentation requested*'.

The Provider sets out that the file was reopened in **April 2012** at the Complainant's request and on **20 December 2012** it wrote to the Complainant declining the claim because:

"[it] believe[s] that the property was unoccupied for in excess of 90 days prior to the incident"

The Provider referred the Complainant to the policy booklet "*Unoccupied Properties – Special Terms and Conditions*" which states the conditions of keeping a property heated and draining the water system, etc., if a property is unoccupied for a period of "*longer than 35 consecutive days between 1st October and 31st March in any year*", and that, in addition to this, if a property is likely to remain unoccupied in excess of 90 consecutive days, the Complainant must inform the Provider, because cover is restricted to "*Fire, Lightning, Explosion, Earthquake and Thunderbolt only*".

The Complainant appealed this decision and on **11 March 2015** the Provider issued a **Final Response Letter** asserting that it had examined statements from the tenants, lease agreements, Private Residential Tenancies Board (PRTB) tenancy agreements, evidence of rental payments and electricity bills and that it:

"cannot accept based on the information and documentation provided by [the Complainant] that the property was occupied for the 90 days prior to the date of loss. However [it is] happy to consider any further clarification and supporting documentation that [the Complainant] can provide."

The Provider further contends that the Complainant did not disclose full information regarding the occupancy of the property to the Provider and that it found there were differences in dates between the leases and the PRTB agreements, also that the rental payments were not conclusive and that the electricity bills "*showed limited usage and little variation*" between **June 2009** and **April 2010**, thus supporting the Provider's view of the property being unoccupied.

The Complainant disputes this and contends that the property was rented to a "Mr JL" and his adult daughter under a six month tenancy agreement commencing the **2 February 2009** and that in the "*Autumn 2009*" the tenant Mr JL was imprisoned, and despite the tenancy agreement expiring after six months, the tenant's adult daughter continued to reside at the property until **23 December 2009**. The Complainant submits affidavits obtained from Mr JL in **2018** confirming that the property was not left unoccupied for a period of 35 Consecutive days between **October 2009** and **23 December 2009**, nor 90 consecutive days between **2 February 2009** and **23 December 2009**, and an affidavit from his daughter Ms SL stating that she:

'occupied the said property without interruption from the 2nd February 2009 until 23 December 2009'.

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The Complainant submits evidence of confirmation of a rent supplement paid by a Government Department to Mr JL in respect of the insured address from "2/2/2009 to 31/10/2009". The Complainant also submits an affidavit from the tenant "Mr M" which states he 'signed the lease' for the insured property on **4 January 2010**. According to the Complainant, prior to this Mr M was renting the other part of the semi-detached property, in unit a.

The Complainant asserts that he co-operated with the Provider's Loss Adjuster and contends that when the Loss Adjuster said it could not process the claim until it had a "face-to-face" meeting with the former tenant Mr M, the Complainant assisted it in locating and arranging a meeting with Mr M.

The Complainant contends that he has provided signed affidavits and furnished electricity bills to vouch occupancy at the insured address, and that the low readings on the electricity bills provided were a result of a relative of a tenant's tampering with the electricity meter and that the electricity supplier had been called to the property on numerous occasions to repair the electricity meter.

The Complainant disputes that the house was unoccupied and says that the break in occupancy was for approximately **twelve days** because the premises was occupied by members of the family up to **23 Dec 2009** and that Mr M occupied the property from **4 January 2010**. The Complainant asserts that "*the various leases and affidavits are on [the Provider's] file to vouch same*".

The complaint is that the Provider wrongfully failed to admit and pay the Complainant's claim for water damage to his rental property.

The Complainant wants the Provider to settle the insurance claim and make good his loss for damage caused to the property as a result of the water leakage from the burst water pipe. A schedule of loss furnished to the Provider in May 2010 refers to a figure of €165,130.74.

The Provider's Case

The Provider relies on the terms and conditions of the policy in declining the claim on the basis that the property was unoccupied in the period preceding the date of loss.

The Provider states that it declined the claim on the basis that it believed the property was unoccupied for in excess of 90 days prior to the incident.

The Provider has set out extensive grounds which it says support this position. The Provider contentions include that:

1. The property did not appear to be occupied on the date of the inspection of the property on 15 January 2010.
2. The Complainant did not invite the alleged tenant (Mr M) to actively participate during the inspection of the property on 15 January 2010.
3. The Complainant did not identify Mr M as the tenant of the property until March 2011.
4. The Complainant delayed significantly in providing documentation to support the existence of the tenancy including bills, account statements and tenancy agreements.
5. The Residential Tenancy Agreement eventually produced in respect of the risk address (for a 6-month lease beginning in February 2009) cited a tenant that was later conceded not to be in occupation in the period preceding the loss (he having been imprisoned some time earlier).
6. The bank statements eventually produced to evidence the payment of rent did not specify inbound payments that could be specifically attributable to the risk property.
7. The PRTB registration document eventually produced in respect of the risk address, which was dated 9-months post loss and which listed a start date of the tenancy as being May 2008, cited different tenants (that is, other than the imprisoned former tenant and other than Mr M) to the Residential Tenancy Agreement previously furnished.
8. A second PRTB registration document eventually produced referred to Mr M as being the tenant of the risk address (No 9) as and from 04 January 2010 notwithstanding that a Residential Tenancy Agreement previously furnished referred to him being the tenant of a different address (No. 9a) as and from the same date.
9. Mr M provided mutually inconsistent statements including as regards the date he took permanent possession with his more recent statement dating from May 2014 suggesting (according to the Provider) that same occurred on the date of loss.
10. A number of different dates were provided by the Complainant as to the date on which Mr M allegedly began his occupancy of the risk address.
11. The utility bills for the risk address do not support the claim that the property was occupied.
12. Two electricity bills furnished for the risk address are mutually inconsistent.
13. The Complainant delayed significantly in providing the explanation that a former tenant had been imprisoned and that his daughter had remained in occupation of the property after the date of imprisonment.
14. A number of different dates were provided by the Complainant as to the date on which the imprisoned former tenant ceased his occupation.

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15. The affidavit signed by the imprisoned former tenant claims that he occupied the property “*without interruption until 23 December 2009*” whereas other documents state either that he went to prison in Autumn 2009 or that he “*moved to [another city]*” in October 2009.
16. The recently produced affidavit from the daughter of the imprisoned former tenant stating that she occupied the insured property “*without interruption from the 2nd of February 2009 to 23 December 2009*” is inconsistent with a separate claim made by the Complainant where he claimed loss of rent for June and July 2009.

The Provider contends that the Complainant has been less than candid throughout the claim process.

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 31 May 2021, 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 Complainant made a submission under cover of his e-mail and attachment to this Office dated 14 June 2021, a copy of which was transmitted to the Provider for its consideration in line with our procedures.

The Provider advised this Office under cover of its e-mail dated 15 June 2021 that it had no further submission to make.

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Having considered the Complainant's additional submission and all submissions and evidence furnished by both parties to this Office, I set out below my final determination.

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 Complainant maintains that his claim should be covered under Section 1(4) of the policy. "Section 1: Landlord Premises" subsection 4 provides cover for:

Freezing, escape or overflow of water from within any plumbing or heating system, fixed water apparatus or fixed domestic appliance.

The Provider relies on an exclusion contained in the same Section of the policy in support of its decision to decline the Complainant's claim. The exclusion excludes cover in respect of:

Loss or damage when the Premises is unoccupied for 90 consecutive days immediately prior to the loss or damage (see Unoccupied Properties – Special Terms and Conditions).

The Special Terms and Conditions referenced immediately above provide as follows:

1. *When the property is unoccupied for a period of longer than 35 consecutive days between 1st October and 31st March in any year any installed central heating system must be kept working to maintain a temperature of no less than 10 degrees centigrade or the water system must be turned off at the mains and the water system completely drained.*

During periods of Unoccupancy the Landlord Premises must be inspected at least once every 14 days by You or a responsible person acting on Your behalf.

When unoccupied the Policy Excess shown on Your Schedule of Insurance is increased by a further €250 for both Landlord Premises and Landlord Contents.

2. *In addition to the above You must inform us if the Landlord Premises is likely to remain unoccupied for a Period in excess of 90 consecutive days.*

If the property is unoccupied for more than 90 consecutive days cover for Landlord's Premises and Landlord's Contents will be restricted to Fire, Lightning, Explosion, Earthquake and Thunderbolt only.

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The Definitions section of the policy defines 'Unoccupied/Unoccupancy' as follows:

Not permanently lived in by You, a Tenant(s) or any other person authorised by You.

Analysis

The Provider, as set out in its Final Response Letter, declined the claim on the basis that it "*believe[ed] that the property was unoccupied for in excess of 90 days prior to the incident*".

The Provider was entitled to make reasonable enquiries to establish whether the property was occupied for the 90 days immediately preceding the loss. The Provider would be entitled to rely on the exclusion set out in Section 1(4) (reproduced above) in declining the claim ('the Exclusion Ground') if the property was unoccupied for 30 days preceding the loss.

There may be a separate issue regarding whether the Provider would be entitled to decline cover in the event that the property was unoccupied for any period of 90 consecutive days or more within the term of the policy by relying on the '*Unoccupied Properties – Special Terms and Condition*' and thereby contending that cover was reduced to "*to Fire, Lightning, Explosion, Earthquake and Thunderbolt only*" ('the Special Term Ground').

I make no finding on the availability or scope of the Special Term Ground, or whether this in fact constitutes a different term/condition to the Exclusion Ground, but, as further discussed below, the facts surrounding occupancy are clearly of central relevance to the grounds relied upon by the Provider in declining the claim. A further provision of the policy requires certain matters to be undertaken in the event that the property is unoccupied for more than 35 consecutive days.

Set against the foregoing, the Complainant maintains that Mr M "*was in full time occupation of the property*" at the time of the loss (ref: letter from the Complainant's solicitor of 15 January 2015). The Complainant has explained that Mr M "*took possession*" of the property on 04 January 2010 and has provided a signed statement from Mr M which attests that he was "*in possession of the property at the times the pipes burst*" (ref: signed statement dated 12 August 2010). It bears highlighting however that the second of Mr M's two statements states that he "*moved to*" the insured property on 7 January 2010. Mr M goes on to say:

"During the day on the 7th January after I moved all my stuff into the front of the building, the water damage happened."

Separately, the Complainant maintains that the imprisoned former tenant "*vacated the property*" on 23 December (ref: sworn statement of the Complainant dated 14 October 2012) and has provided an affidavit from this person stating that he occupied the insured property "*without interruption until 23 December 2009*". It is unclear how this can be reconciled with this tenant having been imprisoned in this period.

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The Complainant has, in his post Preliminary Decision submission, detailed that the above *“is a misunderstanding of the situation”*. The Complainant’s submission continues, and he acknowledged that while *“in an early submission [the Complainant] did, in fact, indicate that it was [his] belief that the person in question was in prison for a period as such had been indicated to [the Complainant]. That, however, turned out not to be the case. [the Complainant] corrected this statement in the last submission which [the Complainant] made to [the FSPO] on 19th August 2020”*.

The Complainant’s submission dated **19 August 2020** details that in relation to the *“inconsistencies in evidence”* and with regard to the imprisonment of the former tenant the Complainant was relying on *“information provided to him by others in good faith which may have, ultimately, not been correct. So, for example, the claimant believed that his first tenant had been sent to prison on the basis of his interpretation of information provided to him by the tenant. This subsequently proved to be an error”*.

I have considered the Complainant’s submission during the preparation of both my Preliminary Decision and this Legally Binding Decision. The content of the submission does not in my view, help to explain or reconcile the differing statements and details given.

The Complainant states however that this tenant’s *“daughter remained in the premises after he was sentenced to a term in jail”*. The Complainant has also provided a sworn affidavit from the daughter of the imprisoned former tenant stating that she occupied the insured property *“without interruption from the 2nd February 2009 until 23 December 2009”*.

The Complainant has, in his post Preliminary Decision submission, detailed that he believes the above is a *“very salient fact, however, does not seem to have been given any weight in the judgement but is interpreted as a cause of conflict of evidence”*. I have fully considered the submission of both parties, and my decision has been made based on my consideration of the submissions made.

There are clearly stark and fundamental conflicts in respect of a number of matters relating to the occupancy of the property.

The Complainant, in his post Preliminary Decision submission, has raised issues in relation to the burden of proof required in deciding whether the exclusions under the policy applied. My role is to decide whether the decision reached by the Provider was reasonable given the information available to it at the time it arrived at its decision.

Given the conflicting information furnished by the Complainant and the extensive enquiries made by the Provider, I accept that it was not unreasonable for the Provider to arrive at its decision to decline the claim on the basis that the property was unoccupied for in excess of 90 days prior to the incident giving rise to the claim in accordance with the policy terms and conditions.

For this reason, I do not uphold this 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.



**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

12 July 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.