



| | |
|---|--|
| <u>Decision Ref:</u> | 2021-0271 |
| <u>Sector:</u> | Insurance |
| <u>Product / Service:</u> | Household Buildings |
| <u>Conduct(s) complained of:</u> | Rejection of claim – partial rejection |
| <u>Outcome:</u> | Upheld |

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

The complaint relates to a home insurance policy and the Provider's refusal to pay a claim.

The original policyholder has sadly passed away and the complaint is made on behalf of the Estate of the policyholder (the Complainant).

The Complainant's Case

The Complainant took out a home insurance policy with the Provider. She states that she submitted a claim for subsidence in the insured property. The Complainant states that the Provider accepted liability for a portion of the claim, on one side of the house, on the basis that there was water escaping from leaking drains and thus "escape of water" is covered under the terms of the insurance policy.

The Complainant submits that the Provider did not indemnify her for the other side of the house on the basis that there were no drains on that particular site. The Complainant submits that initially she was told in the absence of any other evidence that the damage was caused by water flowing uncollected from a downpipe onto a concrete footpath. The Complainant asserts however that it later transpired that the house was built on a disused quarry and that any rational and equitable view of the matter would attribute the damage to this quarry, particularly as the whole of the garden has also subsided.

The Complainant submits that the Provider advised in its final response letter of 5 February 2018, that the cause of the damage could be "*ground movement/slippage or that it may be washing away of fines*". The Complainant contends that subsidence clearly exists and contradicts the Provider's position. The Complainant further contends that in the circumstances, where there are conflicting determinations, it is imperative that all the engineering and site investigations are shared so that a full and true position is presented by these reports. The Complainant asserts that she requested the Provider to share its engineering reports but that only extracts were provided in response. The Complainant further states that she is concerned that the Provider is not adhering to the principle of utmost good faith.

The complaint is that the Provider has wrongfully, unreasonably and through a mistake of fact or law, declined the Complainant's claim under her house insurance policy.

The Complainant wants the Provider to honour the policy and pay the repudiated claim.

The Provider's Case

The Provider submits that the first incident relates to damage to the extension, constructed in the 1970s, which was a result of an escape of water from the external drain system and was therefore covered under the policy.

The Provider further submits that the second incident relates to damage to the original part of the building, constructed in the 19th century. The Provider affirms that it received engineering reports, submitted by the Complainant, which were undertaken to establish the cause of this damage. The Provider states that the following determinations were made:

The report dated May 2014 opines that it is most likely that this has arisen as a result of subsidence of the rear gable wall of the premises as a result of leakage from the two downpipes.

The report dated 5 September 2015 opines that the pattern of cracking visible throughout the structure clearly indicate that the subsoil on which the foundations are bearing, particularly the gable wall, has subsided.

The Provider notes from the above information that the Complainant's engineers initially believed that the damage was due to an escape of water, but they subsequently appear to attribute this to subsidence.

The Provider states that it asked its own consultant engineers to conduct a review and that following this assessment, a series of site investigations were requested. The Provider submits that the outcome of these investigations established two possible causes which were either ground movement/slippage or settlement due to washing of fines.

/Cont'd...

The Provider contends that subsequently, a further report was submitted by or on behalf of the Complainant which concluded that the subsidence had resulted in the cracking which has occurred.

The Provider states that its consulting engineers considered all of the information contained in all of the reports received and the outcome of this process that led Provider to make the following determinations:

There was no evidence to suggest that the damage was due to subsidence;

The damage is more likely the result of ground movement/slippage or settlement, concluding that the subsidence section of the policy does not apply; and

As there were no gullies or drainage provisions in the area to receive downpipes thus allowing drain water to be discharged directly onto the ground, therefore, concluding that the escape of water section of the policy also does not apply.

The Provider therefore contends that the damages are due to the defectively designed/constructed pipes which discharged onto the ground which is not covered under the policy. Accordingly, the Provider has declined to indemnify this aspect of the 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 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 14 July 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.

/Cont'd...

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

The Complainant raised a claim with the Provider in or around May 2012 arising out of a loss that was noted to have occurred in October 2011. The Complainant had a home care policy with the Provider and a copy of the terms and conditions of the policy which were operative at the time of the claim and loss have been provided in evidence.

There were two aspects to the claim. In relation to the damage to the newer part of the building, it was accepted by the Provider that an insured peril was present. This dispute arises out of the damage to the older part of the dwelling, and it is the Provider's case that an insured peril does not exist.

The Complainant submitted a claim for subsidence due to the cracks on that portion of the building. The Complainant states that initially it was thought, in the absence of any other evidence, that the damage was caused by water flowing uncollected out of a downpipe but that it since transpired the house was built on a disused quarry and thus "any rational and equitable view" would attribute the damage to the quarry.

The Complainant also makes the point that even if it was accepted that the damage has been caused by water flowing freely from the downpipe, the insured peril of subsidence has still occurred because the ground in which the building stands has moved to a lower level which satisfies the ordinary and dictionary definition of "subsidence".

The Provider has advised that the reason for declinature is that the claim is excluded, pursuant to the policy terms on the basis that an insured peril has not operated in the circumstances of this particular claim. In particular, the Provider states that it has been advised that the water flowing freely to the ground and the pipe discharging the water is as a result of defective design and/or workmanship which is expressly excluded under the policy.

The policy terms and conditions, provide, amongst other things, as follows:

Section 1 – Buildings and Contents

Events Insured

(See the corresponding exclusions opposite)

We will provide cover for loss or damage to your buildings and contents in your home caused by the following:

- 7. Subsidence, heave or landslip of the land on which your home stands.*

/Cont'd...

Exclusions

(See also the general policy exclusions on page 24)

We will not pay for the excess shown in your schedule or for loss or damage

- *Caused by normal settlement or shrinkage or made-up ground moving, coastal or river erosion (wearing away), inadequate foundations, demolition, construction, or structural repair or alteration;*
- *Caused by using faulty materials or faulty workmanship;*
- *To bolts, fences, gates, decks, footpaths, driveways, terraces, patios, tennis courts, and swimming pools, unless your home is damaged at the same time and by the same cause;*
- *If any of the property on site has previously been damaged by land; moving, subsiding or slipping, and you have not told us about it;*
- *To solid floors unless the foundations beneath the outside walls of your home are damaged the same time and by the same causes.*

In addition, under the general policy exclusions, the following is provided:

General policy exclusions – all sections

Wear and tear

4. We will not cover loss or damage caused by wear, tear or by anything which happens gradually.

The Provider submits that in order for a claim to be covered under an insured peril outlined in the policy, the onus is on the policyholder to demonstrate that the loss was caused by an insured peril.

In its letter of final response dated 5 February 2018 to the Complainant, the Provider very clearly sets out the reason as to why it is declining the claim. The letter states, amongst other things:

"The crux of the matter is, in our view, water flowing onto the ground as described in our consulting engineers (name redacted) report and the pipe discharging same is defective in design/construction. The damages are due to the defectively designed/constructed pipes discharging onto the ground which is not covered under the policy".

/Cont'd...

The Provider also states in this letter that:

"In this case we do not believe that there is any evidence to suggest that the damage is due to subsidence and instead it is more likely the result of ground movement/slippage or settlement due to the washing away of fines both of which are associated with water infiltration".

In light of the foregoing statements and asserted position of the Provider it is important to look at the reports produced as part of the investigation of the damage and cause of damage to the property. There have been extensive investigations and reports. The Provider has procured five reports between 2012 and 2017 from its consulting engineers.

It is important to note that the South of the property is the older and original portion of the building that is the subject matter of this dispute. The north of the property is the more recent construction which has been accepted as an eligible claim by the Provider.

The October 2012 report

This report notes in its executive summary that a small area to the north of the property may be suffering subsidence associated with an escape of water but that further investigations are required in this regard. The report also notes that it is evident on the southern wall that the rainwater gathered discharges directly onto the soils close to the corner of the building where there is no gully and on the south wall the water is discharged against and into the foundations of the building. The report goes on to state that there is clear evidence that the external levels of the site have been reduced on the south-western side of the property and that this reduction in level is considered the most probable catalyst in the development of cracking at this part of the building.

The report concludes that the operation of an insured peril in relation to the damage noted on the southern/Western side of the building has not been established.

February 2013 report

This report concludes that the rear right hand side of the property has suffered a degree of damage consistent with differential settlement of foundations associated with an escape of water and that an escape of water from the external drainage system has been proven in the vicinity of the damage. It is apparent that this report is only dealing with the accepted insured peril and did not address the disputed claim.

December 2014 report

This report was produced on foot of reports prepared on behalf of the Complainant in May 2014.

/Cont'd...

This report states, amongst other things, that it is likely that the discharge of water from the pipes on the older building *"has given rise to the subsidence of the wall in question"*. The report concludes that the water being discharged from the downpipes cannot be fairly described as "leakage" but rather it is an intentional "as constructed" discharge of water directly onto the soils in the immediate area of the foundations to the property. The report concludes that in circumstances where it is not a leak or leakage, and insured peril does not operate in respect of this original part of the building.

November 2015 report

This report was produced following a joint site inspection at the property with the claimant's engineer on 15 October 2015.

This report states that:

"In terms of cause, it would be difficult to argue that the issue is related to design/construction issues and or settlement of fill material in light of the timing of events involved. The building is in the order of 100 - 115 years old and as such any inherent design/construction defects would have become manifest much earlier in the lifespan of the building.

In terms of high-level causes, in our opinion, the only evident intervening events noted at this stage is the discharge of rainwater from the two downpipes into and around the foundations in the area affected.

The fact that rainwater has been allowed to discharge from the downpipes directly onto the ground and indeed into the foundations at or near the rear elevation would, in our opinion, be considered a significant factor here but simply cannot be ignored in terms of cause. This would have to be borne in mind when assessing any further information that may become available through site investigations".

October 2017 report

This report considers the findings of a June 2017 report prepared by engineers appointed by the Complainant.

It is noted that the Complainant's engineer's report comments that the cause is undetermined but presents two possible mechanisms namely ground movements/slippage or settlements due to washing of fines.

/Cont'd...

This report appears to reject any suggestion that the damage or settlement of the building is due to the nearby quarry and the report concludes by stating:

"The drainage arrangement and the pattern of movements, in my opinion, clearly indicates that water discharging from the rainwater downpipes is the most significant factor here in terms of cause."

Two reports have been furnished which were produced on behalf of the Complainant. These are dated May 2014 (with a June 2017 addendum) and September 2015 and an addendum to the May 14 reports dated June 2017 respectively.

May 2014 report

The report concludes that it is clear that significant movement has occurred both in the new and older sections of the house with the latter being more severely affected. In relation to the older section, the report states:

"It is most likely that this has arisen as a result of subsidence of the rear gable wall of the premises as a result of the leakage from the 2 no. down pipes. The effect of this leakage has caused subsidence in this wall, resulting in the cracking outlined in this report."

The June 2017 addendum to the May 2014 report suggests that the damage or settlement of the building is due to the nearby quarry.

September 2015 report

This report, in the form of a letter, states that it is clear that the water from the two downpipes is discharging away from the property but that inspection of the foundations and the cracking visible throughout the structure, clearly indicates that the subsoil in which the foundations are bearing has subsided.

The policy does not define subsidence or provide any distinction between subsidence or "ground movement/slippage" as the Provider states. The Oxford Dictionary definition of "subsidence" is "the process by which an area of land sinks to a lower level than normal, or by which a building sinks into the ground".

Critically, in this case, all of the reports refer to "subsidence" in the area the subject matter of this dispute and I am satisfied therefore that there was subsidence and that subsidence is an insured event. This is evident not only in the expert reports but also from a common sense approach given the facts of this case.

/Cont'd...

The question is whether the cause of the subsidence is one which is excluded under the policy.

In this matter, there are conflicting findings and opinions of engineers and construction experts. It is not the function of this office to prefer the findings of one expert over the other in order to determine a dispute. The Provider acted reasonably in commissioning numerous investigations and reports and in agreeing to consider the later reports which identified the quarry as the cause. The Provider is entitled to rely on the findings of its nominated experts.

According to the Provider's expert, the *water discharging from the rainwater downpipes is the most significant factor in terms of causation*. The Provider's expert also concludes that the water being discharged from the downpipes cannot be fairly described as "leakage" but rather it is an intentional "as constructed" discharge of water directly onto the soils in the immediate area of the foundations of the property.

The Provider's position is that the downpipes discharging water are as a result of defective design and/or workmanship which is expressly excluded under the policy.

In fact, the policy does not exclude defective design it merely excludes subsidence caused by

- *using faulty materials or faulty workmanship;*

I note that the HomePolicy of the Provider that is currently in force expressly excludes subsidence caused by, among other things, "faulty and/or unsuitable design".

There does not appear to be a suggestion or any material evidence that the downpipes in this case were defective in themselves. The problem was that they were designed to let water flow directly onto the ground and not into a drain or as the Provider's expert stated "an intentional as-constructed" discharge of water directly onto the soils".

Design defects typically result from the design professional's failure to produce an accurate and well-coordinated set of construction documents and would be ordinarily labelled as an error or omission or both. A design error is a mistake in a design element whereas a workmanship defects typically result from the contractor's failure to build a structure or component part of a structure in accordance with the design. The consensus here appears to be that the downpipes were constructed intentionally in the manner that they were and therefore there is not sufficient evidence to state that the water coming from the downpipes is as a result of a faulty installation of the downpipes or through defective workmanship in that regard but rather the concept or design of allowing the downpipes to let water flow directly into the ground was the defect.

Accordingly, I believe the conduct of the Provider was improper as it was not entitled, under the terms and conditions of the Policy, to decline the claim. Accordingly, I uphold this complaint and direct the Provider to provide a full indemnity of the agreed adjusted claim under the policy.

Conclusion

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

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 providing a full indemnity of the agreed adjusted claim under the policy.

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**

10 August 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,

/Cont'd...

**(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.

