



<u>Decision Ref:</u>	2021-0467
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Household Buildings
<u>Conduct(s) complained of:</u>	Rejection of claim - fire Claim handling delays or issues Maladministration
<u>Outcome:</u>	Upheld

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

The complaint relates to a household insurance policy.

The Complainant's Case

The Complainant incepted a household insurance policy with a claims handling Company on 1 April 2018. The policy is underwritten by the Provider.

The Complainant made a claim in [Date Redacted] on his policy following a chimney fire in his property claiming for any damage caused as a result of the fire. The Complainant's claim was declined.

The Complainant's representative made a formal complaint to the Provider, on behalf of the Complainant, on 29 January 2019. He stated he was attaching pictures showing the collapse of the flue liners which, he says, clearly show the chimney was professionally lined. He also stated that CCTV conducted was completed after the removal of the cracked liners was complete to avoid damage to the equipment used to complete the survey and he noted the bottom section of the chamber doesn't have any smoke within it which, he says, further supports this statement.

The Complainant's representative stated that he noted the Provider's attempt to decline the Complainant's claim based on the condition to have the chimney professionally cleaned.

He stated that the Complainant is retired for a number of years, however that before his retirement he [occupation redacted] for third parties on a regular basis which is in his/their opinion considered professional.

The Complainant and his representative dispute the Provider's decision to decline the Complainant's claim and its reasons for declining, and they rely on a Mr. C's forensic report, submitted by them, as a further response and evidence in that regard.

The Provider's Case

The Complainant received the Provider's Final Response Letter dated 26 March 2019. It stated the claims handling Company appointed loss adjusters who had visited the Complainant's home and in turn asked for details of his claim from him and his representative. It stated that 2 forensic reports were ultimately compiled, for it, by a forensic Company. It stated it understood that these reports were furnished to the Complainant's representative.

The Provider stated it was the claim handling Company's view that based upon evidence provided that there are defects within the chimney structure, which indicates that the chimney is not professionally lined and insulated, as per the policy condition. It stated that the claims handling Company also felt that the chimney had not been professionally cleaned along the entire length at least once a year, as is stipulated within the policy. It stated that the loss adjusters highlighted that they felt the selected sum insured on the Complainant's policy at €150,000 is inadequate and should be at least €195,000. It stated that the loss adjusters advised there was an inadequate sum insured, which, it says, would have meant that any buildings claim would have been subject to a proportionate reduction based upon this underinsurance, as set out within the policy wording.

The Provider set out policy wording and the general conditions applicable to this insurance. It stated that having reviewed all of the evidence that it is not persuaded that there is a valid claim under the Complainant's policy. It stated that it is a policy condition that applies to all areas of the policy that the chimneys serving open fires are professionally lined and insulated. It stated that it is also expected that chimneys comply with all current building regulations. It stated, referring to Mr. D's forensic report, that it appears on the balance of probabilities the chimney affected was not constructed in a way that would comply with the policy conditions.

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It stated the policy requires that the entire length of the chimney is professionally cleaned at least once a year. It stated that if the Complainant was undertaking this role, as it says he had previously explained, he was not undertaking this in a professional capacity.

The Provider stated that even if it could be persuaded that there was a valid fire claim under the policy, it seems that there are building defects which would need to be attended to make the chimney comply with Buildings Regulations. It stated this betterment works would not have been covered by the Complainant's policy.

It stated it feels the conclusions reached by the claims handling Service Company are fair and that it is unable to accept the Complainant's claim.

The Complaints for Adjudication

The complaint is that the Provider wrongfully and/or unreasonably declined his claim on his insurance policy.

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 17 June 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, further submissions were received by this Office, copies of which were exchanged between the parties.

Following consideration of those additional submissions and all submissions and evidence furnished by both parties to this Office, I set out below my final determination.

It should be noted from the outset that as part of the Complainant's representative's post Preliminary Decision submissions, this office has been requested to not issue the Legally Binding Decision until the Complainant's claim is "*completely settled*". However, it must be noted that the claims settlement amount, did not form part of the investigation or adjudication of the complaint to this office. I have investigated whether the Provider wrongfully and/or unreasonably declined the Complainant's claim on his insurance policy. I have not, as part of my adjudication of this complaint, investigated or adjudicated on the settlement amounts offered or indicated by the Provider or how it has calculated such an amount.

As such I do not consider it appropriate to hold off the issuing of my Legally Binding Decision where the conduct which had been complained of to this office has been investigated and I have considered the parties' post Preliminary Decision submissions in full.

Further to the above it should also be noted that discussions and/or negotiations regarding the claim settlement amount or value of the property is a matter to be addressed by both parties and does not involve this office.

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

Policy Terms and Conditions

The Provider has identified the following general condition in support of its decision to decline the Complainant's claim:

GENERAL CONDITIONS – APPLICABLE TO ALL SECTIONS OF THIS INSURANCE

Chimneys

All chimneys to open fires, solid fuel stoves or burners must be professionally lined and insulated. They must be kept in a good state of repair and must be professionally cleaned along the entire length at least once a year.

The Provider also relies on the following from 'Section 1 Buildings':

What is Covered?	What is excluded?
Loss or damage directly caused by a) <i>Fire, lightening explosion or earthquake</i> b) <i>Smoke</i>	<i>Loss or damage caused by smog, industrial or agricultural output.</i> We will not cover anything which happens gradually. <i>Damage to chimney flue and any resultant smoke damage unless the flue has been:-</i> <i>(i) Professionally lined and insulated</i> <i>(ii) Kept in a good state of repair and professionally cleaned along the entire length as least once a year</i>

Analysis

The Complainant suffered a chimney fire in his home on [date redacted]. A claim was made on the Complainant's policy on 03 October 2018, following which a loss adjuster attended at the Complainant's home on 10 October 2018. On 18 October 2018, the loss adjuster reported (in its Preliminary Report of that date) that it was awaiting sight of CCTV footage of the chimney captured by the Complainant's representative but expressed concerns regarding the sums insured and regarding the condition of the chimney, specifically whether it was subject to annual cleaning as required under the policy.

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With regard to the latter, the loss adjuster noted that the Complainant maintained that he had himself cleaned the chimney with a rod and brush. With regard to the former, the loss adjuster expressed the view that the property was underinsured insofar as the sum insured of €150,000 should properly have been €195,000.

The CCTV footage was duly furnished to the loss adjuster which sought the views of a forensic engineer regarding the footage. This forensic engineer, in a report dated 21 November 2018 based solely on a review of the CCTV images (there was no site attendance), having noted that there was a large void apparent in both flues (the flue where the fire occurred and an adjacent flue serving an appliance in a different room) just above the fireplace, stated as follows:

The large void in each flue is a construction defect. With no flue liner the masonry walls become the flue and do not provide adequate insulation. Flue gases entering the void expand rapidly, slow down, cool excessively and create soot deposits and condensation.

This leads to poor draught, it increases the time to establish a draught and causes an increased likelihood of excessive dust deposition. In turn, this a) makes the occurrence of a chimney fire more likely and b) more likely that if the chimney fire does occur it will be more severe.

The shape of the void(s) seen in the video also creates difficulty in sweeping the flue. Whether swept from the bottom of the chimney or from the top the walls of the void will not be adequately cleaned by the sweeps brush and large ledges are created where soot and other debris will collect.

The forensic engineer concluded as follows:

I consider that the statements and video files provided suggest that the chimney has been maintained and swept on a regular basis, but based on the information available to me it would appear not to be possible to sweep the chimney adequately due to constructional defects. These defects would make a chimney fire more likely and would mean when a chimney fire occurred it is likely to be more severe than it otherwise would have been.

I consider it extremely unlikely that the void or voids shown in the video files have been caused by collapse of flue liners following the chimney fire. I consider it more likely that the voids pre-existed the chimney fire and is contributory towards the cause of the chimney fire.

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The loss adjuster then produced a 'Subsequent Report' dated 7 December 2018 wherein it stated as follows as regards the chimney cleaning requirement:

We note that the policy states that the chimney must be professionally cleaned. The PLA has provided a statement prepared by the insured advising that the chimney is cleaned at least once a year and that this is undertaken by the policyholder. We are advised that the policyholder is not a member of any professional body or other organisation that would provide professional credibility to their ability to sweep the chimney.

Importantly, the forensic report advises that a large void is present above the chimney throat which, in their opinion, is a construction defect that would make it almost impossible to sweep the chimney effectively. The PLA has previously advised that the reason for this void is that the chimney liners had have [sic] collapsed as a result of the fire. The forensic investigator advises that this is extremely unlikely, as there is no evidence to show that there are broken fragments of flue liners in the base of the void. Additionally, there is no evidence of any backfill or other insulating material (typically sand or vermiculite) around the flue liners that would firmly secure the liners within the brick/block chimney flue structure.

The forensic investigator explains that although it may be possible for fragments of the flue liner to become dislodged and fall down the chimney as a result of a soot fire, it is unlikely that four or six flue liners that would have occupied this space would all suffer damage sufficient to break into sufficiently small fragments to collapse and fall through the throat of the fire.

In conclusion, the forensic investigator advises that there is sufficient evidence to suggest that this chimney has been swept on a regular basis but that it would not be possible to adequately sweep the chimney due to the presence of the void/chamber above the fire throat which in their view is a dangerous construction defect. It is the investigator's view that it is extremely unlikely that the void or voids shown in the video have been caused by collapse of the flue liners due to a chimney fire.

On the basis of the foregoing, the loss adjuster recommended that the claim be declined by the Provider, and it was declined.

Following receipt of the correspondence declining the claim, the Complainant's PLA (Public Loss Adjuster), in an email of 29 January 2019, furnished several photographs and made a formal complaint.

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The following commentary was included in the email:

We attach pictures clearly showing the collapse of the flue liners which clearly show the chimney was professionally lined, we would request that you now forward same onto your forensic consultant so that he can examine same.

After speaking with the CCTV company he has stated that the CCTV conducted was completed after the removal of the cracked liners was complete to avoid damage to the equipment used to complete the survey, furthermore we note the bottom section of the chamber doesn't have any smoke within same which further supports this statement.

We also note your attempt to decline this claim based on the condition to have the chimney professionally cleaned, our client is now retired since [date] however before his retirement he used to clean chimneys from third parties on a regular basis which is in our opinion considered professional.

The correspondence above was the subject of an email from the Provider's agent to the loss adjuster dated 31 January 2019 in which the following was stated:

I note that the PLA states prior to the insured retirement that he carried out chimney sweeping on a regular basis for third parties, did the client have a chimney sweep business or was he employed as a chimney sweep? Simply taking a chimney sweep brush and using it on properties does not constitute a professional.

The new photographs were then duly furnished to the forensic engineer who responded by way of letter dated 13 February 2019 stating as follows:

In my previous review of evidence on this matter I expressed concern regarding what appeared to have been a large void at the base of the chimney. I consider it likely, based on the further photographs provided, that flue liners for the living room fireplace and appliance in the kitchen passed through this. It is therefore possible that the "void" observed is the base of the chimney structure and that chimney simply extends with the same horizontal dimensions and a similar construction above, two parallel stacks of flue liners within the same blockwork void. I have seen no evidence to suggest that the void around the flue liners was or is filled with insulation as required by Building Regulations and the evidence available strongly suggests that the chimney structure has been constructed without midfeathers.

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Thereafter, a Final Response Letter issued to the Complainant on 26 March 2019 confirming the rejection of the Complainant's claim on the basis that *"there are defects within the chimney structure which indicates that the chimney is not been professionally lined and insulated"* (sic) and also on the basis that *"the chimney had not been professionally cleaned along the entire length at least once a year"*. The underinsurance issue was also highlighted.

Following the making of a complaint to this office, the Complainant commissioned a report from his own forensic engineer with specific expertise in fire investigation. This report, dated 18 August 2020, comes to an entirely different conclusion to that posited by the Provider's forensic engineer, and indeed to that previously suggested by the Complainant's PLA. The report of 18 August 2020, completed following a site inspection and following interviews with various individuals (including the Complainant, the individual who conducted the CCTV inspection, and a builder), states that the 'void' identified by the Provider's engineer is in fact a *"smoke chamber assembly"* designed to connect the firebox assembly with the chimney and flue and is not therefore the result of any flue liner collapse. A diagram from the internet was included detailing this design. The author concludes that *"there is incontrovertible evidence to suggest that the chimney flues were lined appropriately and as expected for a dwelling of that vintage, and that they had been cleaned by a professional"*.

With regard to the design of the fireplace and chimney, the author details discussion he had with a regional builder who confirmed the nature of the design and further confirmed that whereas the flue required to be lined, there was no similar requirement in respect of the smoke chamber.

The author concluded that the Provider's forensic engineer was incorrect insofar as he identified a 'defect' in the form of a 'void' and that *"the smoke chamber assembly has been misinterpreted as having been an unlined section of flue"*. The author also sought to demonstrate, by reference to measurements taken on site, that the Provider's forensic engineer had significantly over-estimated the size of the 'void'/chamber.

With regard to the requirement to undertake annual professional cleaning, the report notes that the author met with the Complainant who provided a statement as regards his *"previous [occupation redacted] with his brother"* and who *"exhibited [occupation redacted] used by him and his brother from the time they operated a [occupation redacted] business"* (photos of these are included). Reference is made to the remuneration earned for this work. In terms of the cleaning of the smoke chamber assembly, the author noted that the Complainant had confirmed that *"it was simply a matter of using flexible rods and brushes, and allowing them to come into contact with the walls of the chamber"*.

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The Provider declined an invitation from this office to respond substantively to the Complainant's expert's report noting simply that it "*did not agree with the conclusions*" contained therein.

It is clear that the Provider in this instance placed significant reliance on the initial findings of its forensic engineer to the effect that the nature of the 'void' would have made it impossible or very difficult to conduct effective cleaning of the chimney. These views were revised upon review of the photographs belatedly furnished in circumstances where the forensic engineer then determined it likely, having had sight of evidence of broken flues, that, prior to the fire, the flue extended through this void. This would have meant that the difficulty posed to chimney sweeping would not, in fact, have been present. This, it should be noted, was the proposition urged by the Complainant's PLA at the time.

The Complainant has now posited a wholly different proposition, namely that there *was* in fact a 'void' of some description present and this was in fact a design feature called a smoke chamber assembly. The expert evidence marshalled by the Complainant goes on to attest that the design of the Complainant's chimney was unremarkable and standard and, importantly, that there was no requirement to line or insulate the smoke chamber assembly. The foregoing, it seems to me, has a significant bearing on the rationale relied upon by the Provider in declining the claim and, in that regard, it is most unreasonable that the Provider opted not to provide a substantive response to the Complainant's expert evidence. It would have been far preferable had the Provider's forensic engineer offered his views on the Complainant's expert report and conducted a site visit.

In the circumstances, I will consider matters on the basis of the material before me. I propose to consider, in turn, each of the grounds relied upon by the Provider in declining the claim.

Annual Professional Clean

The Provider maintained, prior to it having sight of the content of the Complainant's expert report, that the Complainant's claim to have swept the chimney at least once per year did not meet the threshold of having the chimney "*professionally cleaned along the entire length at least once a year*". It should be noted that the Provider's expert report acknowledges that "*the chimney has been maintained and swept on a regular basis*". The Provider's challenge here focused on the disputed status of the Complainant as a 'professional' chimney cleaner. This point is highlighted clearly in the Provider's agent email of 31 January 2019 which was responding to the claim that the Complainant should be "*considered professional*".

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This email stated :

I note that the PLA states prior to the insured retirement that he carried out chimney sweeping on a regular basis for third parties, did the client have a chimney sweep business or was he employed as a chimney sweep? Simply taking a chimney sweep brush and using it on properties does not constitute a professional.

This is precisely the information which has now been provided within the Complainant's expert report, namely that the Complainant did indeed operate a chimney sweep business and was employed as a chimney sweep. The Provider had the opportunity to challenge or probe this contention but has opted not to do so. The Complainant has also attested as to his competence in cleaning the smoke chamber assembly ("*using flexible rods and brushes, and allowing them to come into contact with the walls of the chamber*") and again, in declining to engage further, the Provider has forgone the opportunity to investigate this further.

In the circumstances, I am satisfied that the Complainant has established that the chimney has been "*kept in a good state of repair and professionally cleaned along the entire length as least once a year*" and, as such, I am satisfied that this is not a ground available to the Provider to rely upon in declining the claim.

Professional Lining and Insulation of the Flue

The Provider's modified position as regards the fire is based on the supposition that the flue extended through the 'void' prior to its collapse during the fire. On the basis of this assumption, the Provider's forensic engineer concluded that he had "*seen no evidence to suggest that the void around the flue liners was or is filled with insulation*" such as the "*sand or vermiculite*" he had noted in his earlier report might have been expected to be evident. With regard to the flue above the 'void', the Provider's forensic engineer had previously noted his satisfaction that this appeared to include "*ten flue liners*".

In point of fact, the only evidentially supported opinion advanced on behalf of the Provider as to the absence of liner or insulation relates to the area where the 'void' was apprehended.

This opinion was proffered prior to the Complainant's revelation regarding the smoke chamber assembly to which the Provider has declined to respond. The Complainant's expert, who had the benefit of a site visit, has concluded that "*there is incontrovertible evidence to suggest that the chimney flues were lined appropriately*".

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This expert has also claimed, unchallenged by the Provider, that there is no requirement to insulate or line a smoke chamber assembly. Indeed, it seems to me that one can fairly characterise the chimney flue as beginning at the top of the smoke chamber assembly and running to the top of the chimney stack; the Provider has advanced no cogent evidence that there was an absence of liner or insulation in this area.

In circumstances where the Provider has declined to engage with the Complainant's expert's views, I am not satisfied that the Provider has established a fact that would entitle it to rely on the 'professional lining and insulation' requirement. As such, I am satisfied that this is not a ground available to the Provider to rely upon in declining the claim.

The foregoing represents the sole grounds identified by the Provider (that are directly linked to the policy terms and conditions) upon which it purported to decline the Complainant's claim. As noted, I am not satisfied that the Provider has demonstrated an entitlement to rely on those grounds and therefore I intend to direct the Provider to admit the claim for assessment, the Provider having surrendered its opportunity to re-engage on those matters.

I should however note that the Provider has adverted to two further issues relating to underinsurance and to 'betterment'. Those are not matters in respect of which the Complainant has engaged and, thus, it seems to me that they must remain available to the Provider to rely on in the context of the assessment of the value (rather than the assessment of the merits) of the claim. I would emphasise that I am expressing no views on these matters other than the fact that they should not be considered to be closed off to either party by virtue of anything in this decision.

The Complainant's representative has, in his post Preliminary Decision submissions, requested that I "*direct*" the Provider in relation to the above matters, including the potential claims settlement amount. As noted previously, I cannot direct a provider to take and or refrain from taking an action unless the matter has been the subject of an investigation and adjudication by my office.

As detailed previously, in this instance I have investigated whether the Provider wrongfully and/or unreasonably declined the Complainant's claim on his insurance policy. I have not, as part of my adjudication of this complaint, investigated or adjudicated on the settlement amounts offered by the Provider or how it has calculated such an amount and its view on if the property was underinsured or the 'betterment' matter. As this has not been the subject of an investigation and adjudication by my office, I cannot make any comment on such matters, nor can I make a direction to either party in relation to them.

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In my Preliminary Decision I indicated my intention to uphold the complaint and direct the Provider to admit and pay the Complainant's claim for assessment and to pay compensation in the sum of €2,000. I note the Complainant's representative in his post Preliminary Decision submission has expressed dissatisfaction with this amount of compensation. I remain of the view, having considered all the circumstances of this complaint, that this is the appropriate amount of compensation.

Therefore, for the reasons outlined in this Decision, I uphold this complaint and direct the Provider to admit and pay the Complainant's claim for assessment and make a compensatory payment to the Complainant in the sum of €2,000.

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) (b), (e) and (g)** on the basis that the Provider's conduct was unreasonable, mistaken and improper.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to rectify the conduct complained of by admitting and paying the Complainant's claim for assessment (without prejudice to the Provider's right to rely in the said assessment on arguments based on underinsurance and/or betterment) and by making a compensatory payment to the Complainant in the sum of €2,000 to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

1 December 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.