DRN-3363529

The complaint

Mr H complains that Society of Lloyd's (SoL) avoided his buildings insurance policy when he tried to make a claim for subsidence. Any reference to SoL includes its agents.

What happened

In September 2020, Mr H took out a buildings insurance policy. In May 2021, Mr H contacted SoL to report what he believed was subsidence damage. SoL instructed a loss adjuster, who went to inspect the property. The loss adjuster said there was evidence of historical cracking, the property was in a poor state or repair and questioned if the level of cover was sufficient.

SoL said when the policy was taken out, Mr H had answered the question it asked about the state of the building as being in a "good state of repair" incorrectly. It says it reached this conclusion based on both the state of the property as determined by the loss adjuster and the first report from the independent contractor Mr H instructed to assess his property. In this report from April 2021, it was noted the cracks began eight and 10 years ago. On this basis, SoL considered this to be a qualifying misrepresentation, which entitled it to avoid the policy and return the premiums.

Mr H brought his complaint to us and our investigator thought SoL hadn't acted unfairly. She agreed there had been a qualifying misrepresentation and agreed SoL was entitled to avoid his policy.

Mr H didn't agree with the investigator and has asked for an ombudsman's decision. Specifically, Mr H said SoL was incorrect in quoting the timeframe of eight to 10 years of cracking being present. The expert he appointed provided further clarification that the cracking was minor when first noticed, and it wasn't right to think he would have lived with the more significant cracking for so long. And that much of the cracking was in an outbuilding, not the house and he didn't consider the outbuilding was covered by the policy. Mr H's key point was the cracking in the utility room was noted to be minor and surface level and the second and more accurate conclusion of his structural engineer was that the more significant cracking was recent in nature. As this matter was unresolved, it was passed to me.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I appreciate Mr H has raised other concerns about the qualification of the loss adjuster sent by SoL and there was later a query about whether come outbuildings and stables were covered by the property. My decision here focuses on what I consider to be the central issue of this complaint – which is whether SoL was entitled to avoid Mr H's policy. I trust both sides won't take this as a discourtesy, but rather as a reflection of our informal role.

The relevant law in this case is The Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA). This requires consumers to take reasonable care not to make a misrepresentation when taking out a consumer insurance contract (a policy). The standard of care is that of a reasonable consumer.

And if a consumer fails to do this, the insurer has certain remedies provided the misrepresentation is - what CIDRA describes as - a qualifying misrepresentation. For it to be a qualifying misrepresentation the insurer has to show it would have offered the policy on different terms or not at all if the consumer hadn't made the misrepresentation.

CIDRA sets out a number of considerations for deciding whether the consumer failed to take reasonable care. And the remedy available to the insurer under CIDRA depends on whether the qualifying misrepresentation was deliberate or reckless, or careless.

SoL says Mr H failed to take reasonable care not to make a misrepresentation when the policy was taken out in September 2020. It focused on the question which asked if the building was in a good state of repair. Mr H answered yes. But SoL considers this is a direct contradiction to the first report provided by Mr H's expert which said cracks appeared between eight and 10 years ago, some of which had been filled and reopened five years ago and got progressively worse.

The question asked of Mr H when he took the policy out was:

> "**Are the Buildings**…
> b) in a good state of repair and will it be so maintained?"

Mr H had to give a yes or no answer to this question and answered yes. This means he considered the property to be in a good state of repair. SoL considers Mr H misrepresented the condition of the property.

I've looked at what Mr H has said about the cracking. He later clarified, and asked his building consultant to do so too, he genuinely believed any cracking in the property to be minimal surface cracking only, and not something he needed to mention. The report also says cracking of concern and the floor misalignment was noticed in late 2020 and progressed quickly. There is a contradiction between the two reports provided by Mr H's expert, and the contradiction is based on when the cracking was first evident. The second report containing the clarification was instructed after the policy was avoided.

Mr H has suggested that proper consideration hasn't been given to the second report, where amendments were made to the findings and comments in the first report. However, I'd like to assure him I've carefully considered both reports.

Having done so I'm more persuaded by the report instructed in April 2021, before Mr H raised the claim with SoL. This report set out that when the cracking (whether surface or not) was first identified several years before being notified to SoL. And given the report clearly noted Mr H was aware of the cracking several years ago, and that it had progressed over time. I can't see we've been given any reason for this report to have set out the timeframe of eight to 10 years unless this had been given by either Mr H or someone else who had detailed knowledge of the property.

The second report was instructed after the policy was avoided, with Mr H keen to seek what he considered to be clarification. But to my mind, the clearest and most persuasive explanation of the history of the cracking to the property was set out in the first report. I think based on the two reports, I think it is more likely than not, Mr H was aware of the presence of cracking in the property before the policy was taken out. It follows, I don't think he answered

the question about the current state of the properly accurately, or that reasonable care was taken when answering the above question.

As I've agreed with SoL's conclusion Mr H failed to take reasonable care when answering the question about the state of the property, I now need to decide if the misrepresentation was a qualifying one. Essentially this means I need to decide if Mr H's answer to this question influenced whether SoL would have offered him the policy.

SoL has provided this service with an extract from its underwriting criteria which sets out that if a property shows signs of subsidence, or (amongst other things) had been monitored for subsidence, cover wouldn't have been offered. This was because the buildings risk would not have been considered acceptable to the insurer. Based on the underwriting criteria, I'm satisfied if Mr H had declared the cracking when he made the application for the policy, cover would not have been granted.

This means I'm satisfied Mr H's misrepresentation was a qualifying one. SoL has said they consider Mr H's misrepresentation was reckless. I agree with this view, as I think based on the first report from Mr H's expert, it more likely than not that the cracking had been present before the policy was taken out and potentially, for as long as set out in the report.

As I'm satisfied Mr H's misrepresentation should be treated as reckless, I've looked at the actions SoL can take in accordance with CIDRA. CIDRA sets out that were there is a qualifying misrepresentation, the policy can be avoided – which happened here. SoL also refunded the premiums Mr H paid, along with simple interest at 8%. SoL hasn't shown it would be fair for it to keep the premiums, so I'm satisfied it has acted reasonably in refunding these when it avoided the policy.

In summary, while I'm sorry to disappoint Mr H, I'm satisfied SoL was entitled to avoid Mr H's policy in accordance with CIDRA. And, as this means that – in effect – this policy never existed, SoL does not have to deal with his claim for subsidence to the property. As CIDRA reflects our long-established approach to misrepresentation cases, I think allowing SoL to rely on it to avoid Mr H's policy produces the fair and reasonable outcome in this complaint.

My final decision

For the reasons set out above, I've decided not to uphold Mr H's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 7 September 2022.
Emma Hawkins
Ombudsman