

The complaint

Mrs G is unhappy with the handling and decline of a claim she made to Amtrust Europe Limited. She's also unhappy Amtrust has backdated removal of subsidence cover from her policy.

What happened

Mrs G owns a property which she lets out to tenants. She's insured the let property with Amtrust since 2011. In June 2021 Mrs G noticed cracking to the wall of the property and reported this to Amtrust to make a claim under her policy.

An inspection was carried out by Amtrust's representatives. Additional information was also requested from Mrs G from the time of sale of the property in 2008.

Amtrust subsequently declined the claim. Amtrust said the property had been suffering with longstanding movement and cracking issues, and if they had been told this when they asked in 2017, they wouldn't have provided subsidence cover. So, they backdated the removal of subsidence cover to 2017, and declined the claim. They also said that settlement was the cause of the movement and cracking, so wouldn't be covered in any event under the policy terms.

Mrs G was unhappy with Amtrust's position and approached this service.

Our investigator looked into things, but she didn't uphold the complaint. She said that Amtrust had acted fairly by declining the claim as the property was suffering from longstanding issues, which she hadn't told Amtrust about. She said that if Amtrust were made aware, then they wouldn't have offered subsidence cover, so it was fair to backdate removal to 2017. She said that she didn't think Amtrust had acted unfairly overall.

Mrs G didn't agree with our investigator and asked for a final decision from an ombudsman.

I reached a different outcome to our investigator, so I issued a provisional decision, to give both parties an opportunity to comment on my findings, before I reached my final decision.

What I provisionally decided – and why

In my provisional decision, I said:

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

Mrs G reported cracking to her property in June 2021. An inspection was carried out by Amtrust and they concluded that the cracking was a long-standing issue. They relied on street view images, along with the pre-purchase survey from 2008, to conclude this.

I've seen the images Amtrust has relied on. And they do appear to indicate historic cracking problems with the property. The images date back to at least 2012 and clearly show cracks present over the years, and no decoration appears to have taken place since that time, so the cracks do appear historic.

The pre-purchase survey from 2008 also says:

"Evidence of movement was observed in the form of slight distortion to the external walls together with further cracking to the internal partitions. We are of the opinion that the movement is long standing in nature, and that the risk of further movement taking place is acceptable."

Therefore, this also indicates a long-standing problem.

Even if I discounted the pre-purchase survey, as it doesn't have any photos, the later street view images from at least 2012 also reflect the same. With this in mind, I don't think Amtrust has acted unfairly by concluding the property is suffering from a longstanding issue. Whilst Mrs G has said she was unaware as there were tenants in the property, she still has a responsibility to check and maintain her property and as I say, the cracks appear to date back several years.

Amtrust has removed subsidence cover back to 2017 when it says Mrs G should have made them aware of issues with her property. This is on the basis of the following reflected on Mrs G's documents from 2017 renewal:

"Has the property experienced any existing or previous stepped/diagonal cracking, subsidence/ground heave/landslip, movement or underpinning?"

And this was answered 'No'. Amtrust say that as the images, and pre-purchase survey, demonstrate a longstanding movement and cracking issue, Mrs G should have notified them and answered the question as 'Yes'.

I agree with Amtrust's view that Mrs G should've made them aware at the 2017 renewal (and subsequent renewals) that her property was suffering issues. This was something that Amtrust needed to know and the renewal documents reflected this. So, I agree with Amtrust that Mrs G should've made them aware at the time and later renewals.

Mrs G holds a commercial policy as she is a landlord. When taking out and renewing this policy for her let property, she's a commercial customer. This means the relevant act that applies here is the Insurance Act 2015.

In summary, this says that Mrs G had a duty to make a fair presentation of risk to the insurer. And this means disclosing every material circumstance which the insured knows, or ought to know. Or failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice to make further enquiries for the purpose of revealing those material circumstances.

The Insurance Act 2015 lists several remedies that an insurer can take when there has been a misrepresentation and a qualifying breach. And of relevance here, this includes, if the insurer had been made aware and would have entered the contract and applied different terms, the contract can be treated as if it had been entered into on those different terms.

This is what Amtrust says it has done here. They say that if Mrs G had told them about the cracking and movement issues with her property, then they wouldn't have provided subsidence cover. So, they've backdated removal to 2017, when Mrs G should've made them aware based on the documents and information contained within these (and the same incorrect information remained at later renewals) as I've outlined above.

However, based on the evidence provided, I'm not minded to conclude it was fair and reasonable for Amtrust to backdate removal of subsidence cover or that they've sufficiently demonstrated that would've been what they'd have done, if Mrs G made them aware of the cracking and movement in 2017 (or after). I'll explain why.

In support of Amtrust's position to backdate removal of subsidence cover, they've provided an extract from their underwriting guide. They say this shows what they would've done if they'd been made aware. Whilst I can't share this fully with Mrs G due to it being commercially sensitive, I've had sight of this.

In summary this says if there is *existing subsidence*, or has been *previous subsidence*, Amtrust would then exclude subsidence cover from the policy. So, in principle, if there had been or was existing *subsidence*, the backdated removal would be in line with the underwriting criteria and the remedies in the Insurance Act 2015. Therefore, if that was the case, I'd likely agree that was fair and reasonable.

However, it's not actually been concluded there is existing (or was previous) *subsidence*. I say this firstly because the house survey from 2008 said there was evidence of movement and cracking which was longstanding, and an acceptable risk of further movement, but it didn't identify subsidence was causing it.

In addition to this, following the reporting of the claim, Amtrust's specialists investigated the cracking and movement and concluded:

*"We are clearly concerned with a longstanding problem and very gradual movement only. This indicates we are **simply concerned with a settlement problem**.*

The orientation of the crack suggests downward movement to the front part of the building, which is founded higher than the rear part as the cellar room is not as low as the room behind.

The different foundation depths are therefore the likely reason for the differential movement.

The trees to the rear cannot possibly have an influence on the front of the building and in view of the depth of the foundations, the property would not be susceptible to sub-soil shrinkage problems here, even if shrinkable clay soils were present, which is not at all likely.

All the services are also to the rear of the building, so leakage from underground services can also be discounted as a probable explanation."

Therefore, at the moment, it appears it's been concluded the property is suffering from *settlement*, rather than *subsidence*. And Amtrust has only shown that if there is previous or existing *subsidence*, that this would result in subsidence being excluded from cover. But that's not been concluded.

So, whilst I agree that Mrs G should've made Amtrust aware and answered the question as 'Yes' (as this also includes cracking and movement) in 2017 and subsequent renewals, Amtrust hasn't shown that settlement, cracking, movement etc more generally would have resulted in subsidence cover being excluded from the policy. Only previous or existing confirmed *subsidence* would result in that, which isn't relevant here – based on the evidence I've seen.

So, unless anything changes as a result of the responses to my provisional decision, I'm minded to conclude it was unfair and unreasonable for Amtrust to backdate and remove the subsidence cover, and therefore they should reinstate it.

However, this doesn't then mean Amtrust should also deal with Mrs G's claim even if she did consequently have subsidence cover in place since 2017. This is for the reasons I've outlined already around whether there is/was actually subsidence. The specialists determined it was *settlement* of the property, rather than subsidence. And Mrs G has also said that too, following discussion and a quote for repairs from her builder. But Mrs G's policy excludes damage caused by *settlement*, so there isn't any cover for her claim in any event.

Therefore, whilst I'm not minded to conclude Amtrust has acted fairly by removing (and backdating) subsidence cover more generally, regardless of this, I don't think they've acted unfairly by declining the claim, as it's not covered under Mrs G's policy.

Mrs G has also said she's unhappy with the overall service she's received from Amtrust and the conduct of their agents, including when they inspected her property. But Amtrust has confirmed the call recordings are unfortunately unavailable and I wasn't there at the visit, so I'm not able to comment on this specifically. But as I think the claim decision was fair overall, I'm not minded to conclude this has been detrimental to Mrs G, even if I think it was unfair to backdate removal of cover more widely. Aside from the decision to backdate removal of subsidence cover, overall I don't think the claim handling has been poor or delayed."

So, I was minded to uphold the complaint in part and to direct Amtrust to reinstate subsidence cover, but I didn't think they had acted unfairly by declining the claim.

The responses to my provisional decision

Mrs G responded to my provisional decision but she didn't agree. She said Amtrust's intent was always to decline her claim. And she remains unhappy with the actions and conduct of Amtrust's agents.

Mrs G also said she is completely sure the crack wasn't present, and just because someone acting on behalf of the insurer says it was, doesn't make it true. She therefore disputes she answered the question about cracking or movement incorrectly.

Amtrust responded and they also didn't agree. They didn't provide any further comments around the claim decline itself or my findings in relation to that part of this complaint.

However, Amtrust disagreed that they hadn't demonstrated they wouldn't have offered subsidence cover, or that it was unfair to backdate removal. They said the document is used internally and underwriters interpret this differently to the content within it specifically. And on this basis, they say that if the question had been answered correctly, they wouldn't have provided subsidence cover dating back to 2017, so the backdated removal was correct.

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.

And I've thought carefully about the conclusions I came to in my provisional decision, along with the responses to it. But I haven't reached a different outcome.

I note Mrs G remains unhappy with the conduct of Amtrust's agents. But as I explained in my provisional decision, the call recordings are unavailable and I wasn't present during the visit so I'm unable to conclude what was discussed with any certainty. And as I outlined, I don't think the claim decision was incorrect even if Mrs G was unhappy with the visit itself.

Mrs G also maintains that the cracks weren't present previously, and therefore she hasn't answered the question incorrectly. However, I explained in my provisional decision that I'd seen the street view images, and they do show this dating back to at least 2012. And nothing provided has changed my view of that.

So, my view remains Mrs G should have answered the question as 'yes' and for the same reasons outlined in my provisional decision. In this, I said that the relevant act which applied was the Insurance Act 2015 as Mrs G is a commercial customer.

This says that Mrs G had a duty to make a fair presentation of risk to the insurer. The Insurance Act 2015 lists several remedies that an insurer can take when there has been a misrepresentation and a qualifying breach. This includes, if the insurer had been made aware and would have entered the contract and applied different terms, the contract can be treated as if it had been entered into on those different terms. This is what Amtrust says they did here.

I'm satisfied Mrs G answered the question incorrectly and my view of that remains the same. But in my provisional decision I said I wasn't persuaded there was a qualifying breach as I didn't believe Amtrust had demonstrated they wouldn't have offered subsidence cover had the question been answered differently. So, I said I was minded to direct Amtrust to reinstate (backdated) subsidence cover.

Amtrust didn't agree with what I said here. They say that the underwriting guide is an internal document, used by its underwriters. They said the underwriting guide, solely and only outlining previous/existing subsidence and what would happen, would be understood by underwriters to not just be confirmed or existing subsidence, but much wider than this, and for cracking and movement for other reasons. Amtrust say they shouldn't have to add wider detail beyond what it says that I've referred to, into their underwriting guide, as it's an internal document not seen by the customer.

And Amtrust say that the statement of fact asks a wider question and the question is phrased in a way to capture all possibilities of moving and cracking, in order to decide whether the policy is suitable. Amtrust say there is no argument the cracking is longstanding, and Mrs G misrepresented by not disclosing that, and Amtrust maintain they wouldn't have offered subsidence cover if she had.

I agree that Mrs G made a misrepresentation as I've said. Whilst I note Amtrust's comments in relation to the underwriting guide, my view of this remains the same. I'm not persuaded Amtrust has demonstrated removing the subsidence cover is what would've happened. The Insurance Act 2015 says that there are remedies available if there is a qualifying breach. However, for me to say Amtrust has acted fairly, I'd need to be satisfied it had demonstrated there was one. But I'm not persuaded it has.

As I said in my provisional decision, the underwriting guide only refers to previous or existing subsidence. And if there was previous or existing subsidence, I don't think Amtrust would have acted unfairly as they would have sufficiently demonstrated there was a qualifying breach as the underwriting guide clearly outlines previous or existing subsidence specifically and that it would then be excluded.

However here there's neither previous or existing subsidence. There is settlement. Settlement itself is specifically excluded, in any event, under the standard policy terms. That's also why Amtrust declined the claim (which I think was fair and correct to do so). So, removing the subsidence cover specifically, doesn't change the overall policy in relation to settlement, as that was always excluded in any event. Whereas the policy includes subsidence cover as standard, so to limit that cover, I can see why Amtrust would ask that question in order to consider the subsidence risk specifically. And the underwriting guide confirms what would happen in the event of disclosed previous or existing subsidence specifically too.

But beyond that, I'm not persuaded Amtrust has shown that it would've removed subsidence based on their underwriting criteria if existing damage wasn't subsidence related. I say this because the policy already has measures in place to restrict cover (as standard) for damage and cracking caused by movement such as settlement, or more broadly, wear and tear, gradual damage, or damage which pre-dates the policy.

Therefore, with the above and my provisional decision in mind, I agree Mrs G has misrepresented based on the documents and question. But I'm not satisfied Amtrust has shown it was a qualifying breach or they would've acted differently (by removing subsidence cover) if she had answered differently, in line with the Insurance Act 2015. Consequently, Amtrust should reinstate (and backdate) subsidence cover under Mrs G's policy.

However, as outlined in my provisional decision, that doesn't mean Amtrust need to deal with Mrs G's claim. The cracking is the result of settlement, and all opinions and the expert report agree with this. As settlement is excluded under Mrs G's policy, Amtrust has acted fairly by declining the claim on this basis. Nothing provided in response to my provisional decision has changed my thoughts or reasoning on this part of the complaint.

My final decision

It's my final decision that I uphold this complaint in part and direct Amtrust Europe Limited to:

- Reinstate (and backdate to 2017) subsidence cover under Mrs G's policy

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 9 May 2022.

Callum Milne
Ombudsman