

## The complaint

Mrs B complains about Arch Insurance (UK) Limited's ("Arch") decision to decline a subsidence claim made on her commercial property insurance policy.

Mrs B is represented in bringing this complaint. Any reference to her includes the comments of her representative. Any reference to Arch includes the actions of its agents.

## What happened

The circumstances of this complaint are well known to both parties, so I've summarised events.

- Mrs B has a commercial property insurance policy for a building she operates a childcare business from. Following a grant from the Local Council, the property was renovated in 2017, and a certificate of completion was issued the same year.
- The insurance policy relevant to this complaint was taken out in November 2021 and is underwritten by Arch. Whilst Mrs B had prior cover with Arch – it has confirmed the 2021 policy was a new policy, and not a renewal of an existing policy.
- When taking out the policy in 2021, Mrs B added subsidence cover as an optional contingency – something she didn't have in place for the two years prior.
- Mrs B made a claim in August 2022 after decorators advised her to have cracks in her property's wall investigated.
- Arch's loss adjuster attended a month later and concluded "*subsidence due to the effects of clay shrinkage induced by moisture extraction via tree roots*" was the suspected cause of the damage. But it said the damage pre-dated the start of the policy and so, wasn't covered.
- In reaching its decision it said Mrs B said she'd "*been aware of minor cracking [...] for some years*" and that the cracks had been filled and redecorated. Arch said she'd explained that in the summer of 2022 the cracks worsened and so - believing it could now be subsidence - Mrs B contacted Arch.
- Mrs B complained about Arch's decision to decline her claim. In its final response dated February 2023, Arch maintained its position, saying:
  - Its loss adjuster's report showed evidence of previous patch repairs where cracking had reoccurred. It said the mismatch of paint suggests the repairs were completed later to the original decorating in 2017.
  - It had information which highlighted ongoing third-party subsidence damage claims against Mrs B's property dating back to October 2020. And that a third-party insurer had put it on notice in January 2021 regarding possible subsidence to the neighboring property. And so, Mrs B was aware of potential subsidence surrounding her property.
  - The subsidence related issues were not disclosed when the policy was taken out. Had it been, its underwriters have confirmed subsidence cover would

have been restricted pending a full survey of the property.

- It added that Mrs B had cover with Arch from 2020 – via a different scheme – which was being investigated. It has since said subsidence cover wasn't provided with the previous cover.
- Unhappy, Mrs B brought a complaint to this Service. She refuted Arch's comment that patch repairs had been undertaken and said she *hadn't* noticed the damage some years earlier as recorded by Arch's loss adjuster.
- An Investigator considered the complaint but didn't uphold it. She was more persuaded the damage occurred before the policy started and that Mrs B had misrepresented information at the time of taking out the policy by not disclosing the liability claim from her neighbour in respect of possible subsidence.
- Mrs B didn't agree. She provided further evidence – including statements from staff - which she said supported her position that the cracks in the wall were only noticed a month prior to the claim being made, as well as her assertion that the walls were regularly partly painted because of it being a childcare setting.
- She said the patch repair argument put forward by Arch wasn't evidence of her having completed repairs to damage which pre-dated the policy. Nor did it show she'd misrepresented information at the time of taking out the policy.
- She also said the issue with the neighboring property was about relining a drain and so, ultimately was, an unproven, unevidenced, potential subsidence claim. And given Arch were aware of this in January 2021, there was no reason she'd need to flag it again.
- The Investigator considered the evidence, but it didn't change her mind. Because Mrs B disagreed, the complaint has been passed to me for an Ombudsman's decision.
- Having reviewed the complaint, I issued a provisional decision, in which I said:

***“What I've provisionally 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.*

*Having done so, I've reached a different outcome to the Investigator. In coming to my decision, I've kept in mind the relevant law, together with Arch's responsibility as an insurer to handle claims promptly, fairly and to not unreasonably decline a claim.*

*There are two issues to be decided. The first is whether Mrs B misrepresented information when taking out the policy in November 2021. If she didn't, the second issue to consider is whether the damage pre-dated the start of the policy and is therefore, not covered.*

***Misrepresentation***

*As Mrs B has a commercial policy, the relevant law is the Insurance Act 2015. The Act requires the insured to make a fair presentation of the risk to the insurer at the time of taking out the policy. This means the insured needs to disclose every material circumstance which they knew or ought to have known. Failing that, the insured needs to give the insurer sufficient information which would put a prudent insurer on notice that it needed to make further enquiries for the purpose of revealing material circumstances.*

When taking out the policy, Mrs B was asked to confirm:

*“[...] b) the Buildings are in a good state of repair and will be maintained in such condition.*

*c) There are NO signs of subsidence, landslip, heave or other movement in the buildings or in the neighbouring buildings.”*

*From reading Arch’s final response letter, it appears there are two grounds for it concluding Mrs B didn’t make a fair presentation of the risk when taking out the policy. It says she didn’t disclose a third-party subsidence claim against Mrs B’s property – which dated back to October 2020 – and she didn’t tell Arch about internal cracks to her property. I’ll address each in turn.*

#### *Third-party subsidence claim*

*With regards to the claim that vegetation on Mrs B’s property was causing damage to her neighbour’s property, I’m satisfied this was a material circumstance which Mrs B knew about at the time of taking out the policy. However, I’m not persuaded her not disclosing this at that time meant she didn’t make a fair presentation of the risk. I’ll explain why.*

*There are exceptions where The Insurance Act doesn’t require the insured to disclose a circumstance and that is if the insurer knows the circumstance, ought to know it, or is presumed to know it. An insurer “knows something” only if it is known to one or more of the individuals who participate on behalf of the insurer in the decision whether to take the risk, and if so, on what terms.*

*The insurer “ought to know something” only if an employee or agent of the insurer knows it and ought reasonably to have passed on the relevant information to an individual who participates on behalf of the insurer in the decision whether to take the risk.*

*I’ve seen evidence which shows Mrs B was engaging with Arch about a claim brought by her neighbour in May 2021 regarding potential subsidence. The following extracts are taken from emails sent by Mrs B to Arch during this time.*

*“[...] my issue is I think it is a smokescreen to come and claim the trees are causing subsidence which is dishonest. [...] Finally, have they responded to you with the evidence/additional information you asked for about the tree issue please?”*

*“[...] they are asking us to cut the Cherry Tree and Sycamore Tree [...] Are we legally able to ask them to cut their massive tree down first, as I’m sure it is probably the one causing damage to their house, if at all. I would like to get a surveyor to come and do a comprehensive survey to check their assertions.”*

*So, I’m in no doubt Mrs B had told Arch about the issue with her neighbour’s property. This, coupled with the fact Arch instructed a loss adjuster regarding this matter, and has acknowledged in its final response letter that it had information dating back to October 2020 about a third-party insurer claim, satisfies me that it “ought to have known” about this “material circumstance”. And so, I’m satisfied Mrs B did make a fair presentation of the risk in respect of this particular material circumstance.*

#### *Signs of subsidence*

*But Arch has also said Mrs B didn't disclose her property was suffering from internal cracks – which sometimes is a sign of subsidence. It's relied on its loss adjuster's report - who'd said Mrs B had said she'd "been aware of minor cracking for some years" to base its opinion. Arch said that had it known about these cracks, it would have restricted subsidence cover pending a survey of the property.*

*Arch has placed substantial weight on Mrs B's testimony that the cracks had been known to her for some years and has said - what it considers to be patch repairs – to be evidence of the damage being in existence before the policy started - and so, says Mrs B failed to make a fair presentation of the risk.*

*Mrs B strongly refutes saying she was aware of the cracks for "some years". She insists she only noticed them a month prior to making the claim, and that it was only because they suddenly worsened, she decided to contact Arch. I note in an email to Arch in August 2022 Mrs B said:*

*"We noticed a hairline fracture earlier in the summer and this has gradually become bigger and is now on a number of walls in the building. I called a builder in this week to carry out some redecoration and while he was there, he suggested a structural engineer should take a look at the cracks."*

*So, on its face, when Mrs B told Arch about the claim, she did so having made it clear she'd noticed the cracks a month earlier. Whilst this alone wouldn't persuade me the loss adjuster's findings can't reasonably be relied on, when I consider the other available evidence, it adds weight to Mrs B's position that she hadn't been aware of the cracks for some years.*

*I can't be certain about the discussion which took place between Mrs B and the loss adjuster, but I have seen that the loss adjuster later said:*

*"...whilst damage may have been apparent to a lesser degree some years ago, we do not believe that the policyholder would have been able to identify the damage as having been caused by the subsidence of the site."*

*As Arch's own loss adjuster has commented in their view Mrs B wouldn't have been able to identify this as subsidence, I find this compelling as to her capability to know this.*

*Mrs B was asked to confirm there were "No signs of subsidence" but I haven't seen that she was told what a sign of subsidence would be. And so, when I consider the loss adjuster's comment that she would have unlikely known hairline cracks (if they existed), would be subsidence, I don't consider it fair and reasonable to say she failed to make a fair presentation of the risk when taking out the policy on the grounds that she didn't tell Arch about internal cracks.*

*Arch has said it would have acted differently had it known about the cracks to Mrs B's property – by restricting subsidence cover, or by not providing subsidence cover at all (I've seen evidence of it saying both). But "whether it knew" isn't the relevant test. What's key is whether Mrs B made a fair presentation of the risk – and as I'm satisfied she did, there is no remedy available to Arch.*

*So, I've gone on to consider whether the damage to Mrs B's property pre-dated the policy and is therefore, excluded under the policy.*

*Damage pre-dating the policy*

*Arch's loss adjuster concluded the most likely cause of the damage was subsidence. But it has said the claim isn't covered because the policy excludes damage "commencing prior to the issue of cover under this policy." Typically, I would expect damage that has occurred during the time the policy was active to fall to the live insurer; even if this began prior to the start of the policy.*

*Because Arch is seeking to rely on this exclusion to decline the claim, the onus is on it to show it applies. And so, it needs to evidence the cause of the damage started and stopped before the policy commenced.*

*I've been provided with an extract of text authored by the loss adjuster. In it, the adjuster suggests the cracking started in 2018. But it's not entirely clear why this date was put forward as in support of this conclusion there's simply a comment which says:*

*"2018 would be a fairly good candidate for also having produced some similar minor cracking."*

*And in any event, the loss adjuster goes on to say in respect of this date "we are not able to state this for certain" - which isn't persuasive evidence.*

*In a similar vein, whilst Arch has relied on patch repairs and Mrs B's testimony (though disputed by her) that she noticed cracks some years before, the loss adjuster has said:*

*"can't estimate when the previous repairs were carried out beyond the insured's advice of several years ago".*

*Again, this isn't convincing evidence of the cause of the damage having started and stopped before the policy commenced. And so, based on the information I have, I'm not persuaded Arch has shown damage hasn't occurred during the time it was on risk – therefore, I'm not satisfied it can fairly and reasonably rely on the exclusion to decline the claim. And it, therefore, needs to take further action.*

### **Putting things right**

*In summary, I'm satisfied Mrs B made a fair presentation of the risk with regards to the third-party claim and internal cracks. I'm not however, satisfied Arch has shown sufficient evidence to fairly rely upon its exclusion and so, I intend to direct it to accept the claim. This means it'll need to carry out the investigations along the lines it has previously outlined.*

*Because I consider Arch's repudiation of the claim to have been unfair, it follows that I'm satisfied its actions have caused Mrs B avoidable distress and inconvenience, as well as elongated the experience, as things remain at an early stage of the claim. I note she suffers from health concerns and the ongoing stress of this situation has been felt more greatly by her, and so, it should also pay £400 compensation to reflect the difficulties caused.*

### **My provisional decision**

*My provisional decision is I uphold this complaint and direct Arch Insurance (UK) Limited to accept the claim and pay Mrs B £400 compensation."*

### **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.

As both parties accepted my provisional findings – and didn't provide further information for me to consider, my final decision is the same as that set out in my provisional decision.

**My final decision**

My final decision is I uphold this complaint and direct Arch Insurance (UK) Limited to accept the claim and pay Mrs B £400 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 24 May 2024.

Nicola Beakhust  
**Ombudsman**