

The complaint

Mrs H and Mr H complain that Amtrust Europe Limited have declined their claim for subsidence and applied a retrospective exclusion to their policy.

What happened

Mrs H and Mr H have held a buildings and contents policy with AEL since 2016 for a property that they let out.

In October 2022 Mrs H and Mr H made a claim for subsidence. When investigating the claim, AEL said Mrs H and Mr H had answered the question it asked about cracking on the property incorrectly at each renewal since 2019. And it considered this to be a careless qualifying misrepresentation, which entitled it to decline the claim and apply an exclusion for subsidence from renewal in 2019.

Mrs H and Mr H were unhappy with this and brought their complaint to us. Our investigator initially thought their complaint should be upheld as he thought there was no qualifying misrepresentation, but after further representations from AEL, he changed his view and thought that Mrs H and Mr H had been aware that there was cracking in 2019, and so he changed his view and didn't uphold the complaint.

Mrs H and Mr H didn't agree with the investigator and have asked for an ombudsman's decision and so the case has come to me to decide.

I issued a provisional decision on the complaint. My provisional findings were as follows:

I'm upholding this complaint with a different outcome to the investigator, and I will explain why.

The relevant law in this case is The Insurance Act 2015 as Mrs H and Mr H are the landlords of this property. However, our investigator felt it was fairer, because of Mrs H and Mr H's circumstances - only having one rental property - to consider the rules set out in Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA), as they are more akin to consumers than a business.

I agree with this and have considered the principles of CIDRA when thinking about a fair and reasonable outcome. 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.

AEL thinks Mrs H and Mr H failed to take reasonable care not to make a misrepresentation on renewal on 1 August 2019 and so they have applied the subsidence exclusion on the policy from the 2019 renewal onwards.

So I have looked at what happened at policy inception and at the renewals from 1 August 2019 onwards to see what declarations were made by Mrs H and Mr H and to consider if they took reasonable care when responding to the questions asked about cracking and subsidence.

In the statement of facts issued at each of the renewals from 2019 onwards the following question is stated as asked:

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

On all statements from 2019 onwards the response is recorded as "No".

The covering letter to the intermediary which was forwarded onto Mrs H and Mr H with the renewal policy documents says:

"Attached is your customer's renewal schedule, important information and statement of fact. Please ensure that the details are correct in conjunction with your own records before forwarding in entirety to your customer Failure to inform us of any material changes to the risk may affect your client's entitlement to the protection and benefits of this policy."

Mrs H and Mr H don't live in the local area of the property and they use a managing agent for inspections and organising repairs. In October 2018 the agent provided Mrs H and Mr H with a report which said that there were cracks above the front door.

Mr H asked the agent to arrange for this to be inspected by a local builder, and in December and January Mrs H and Mr H requested updates from the agent about this but received none. Following a change in agent, and the property being vacated, an inspection report was provided to Mrs H and Mr H in February 2019. The report includes a large number of photographs of the interior of the empty property in every room, and comments on the condition of those rooms and any points of notice.

There are various interior cracks recorded in the 2019 report as follows:

*Hallway – slight cracking on ceiling
Reception two - cracking in ceiling
Stairs and landing – cracks in ceiling, cracks in walls
Bathroom – one cracked tile
Bedroom two – cracks in ceilings
Bedroom three – Big crack in wall (inside built in cupboard)*

On 13 June 2019 a mid tenancy inspection was completed but there was no mention of cracking or pictures of it.

On 20 June 2019 the agent provided a quote from a builder for removing the brickwork above the front door, installing a lintel, and replacing the brickwork, as the builder had

inspected it and advised the reason for the cracking above the front door was because the wooden door has been replaced with a UVPC one and there was no lintel. Photos of the brickwork were provided and showed it to be stepped cracking.

So given the report from the agent and the builder I've thought about what Mrs H and Mr H knew at the time of the renewal in July/August 2019, and whether it was reasonable for them not to have answered the question about stepped and diagonal cracking as a yes.

In view of the above I think it was evident to Mrs H and Mr H that there cracking above the door front door and some cracks in the interior walls of the property. I've viewed the interior photos in the report and with the exception of the crack in the cupboard in bedroom three these cracks look like plaster cracks and I don't think they would give rise to any real concern.

However, I'm satisfied that it would have been reasonable to expect Mrs H and Mr H to tell AEL prior to the renewal that there was cracking above the front door, even though they had no reason to suspect that it was related to subsidence at the time.

AEL has provided us with their underwriting criteria which shows that had they known about the stepped cracking on the front wall at the time of renewal, they would have excluded subsidence cover going forward and so I'm satisfied that Mrs H and Mr H's misrepresentation was a qualifying one.

AEL have said that Mrs H and Mr H's misrepresentation was careless, and this allows them to apply an exclusion from the start of the 2019 policy.

I agree that this misrepresentation is careless, and the remedies under CIDRA in that situation would allow AEL to place the exclusion on from the policy year 2019/20. However, as I think Mrs H and Mr H would have had a valid claim in 2018 for subsidence, but for the poor advice they received, I'm proposing a different outcome in this case, which I consider gives a fairer outcome.

Mrs H and Mr H have been insured with AEL since 2016, and when they responded to the renewal invite in 2019 they would have been on cover under their 2018-2019 policy.

If Mrs H and Mr H had contacted AEL and told them about the stepped cracking when they accepted the renewal, AEL would have been on notice of the possibility of subsidence within the policy year 2018-2019. As the insurer for that year I would have expected them to have advised Mrs H and Mr H that this could be an indication of subsidence and advised them to start a claim, not just place an exclusion on.

So I asked AEL what would have happened if at the time of the 2019 renewal, Mrs H and Mr H had made them aware of the cracking even though they didn't suspect it was related to subsidence.

AEL have responded that:

"If the customer had made a claim for prior to renewal, then we would have carried out investigations to determine the presence of subsidence.

If those investigations were concluded prior to renewal and it was found that there the property was not experiencing subsidence, then underwriters would consider all the available information to decide whether we wanted to offer continuous subsidence cover. We can't say for sure what terms would be offered as there may

be other risk factors discovered during the investigations that would affect our decision.

If the claim was still open at renewal and investigations were ongoing, then we would have offered continuous subsidence cover.”

And so if AEL had been alive to the issue of cracking at renewal, I think it is fair to say that they would have been investigating and would have continued to offer subsidence cover.

Given that Mrs H and Mr H have had continuous cover with AEL since 2016 it doesn't feel fair for AEL to retrospectively exclude cover for something that was first noticed in a year they were providing cover for. The only reason a claim wasn't made in 2018 was because Mrs H and Mr H got professional advice about the cause of and remedies for the cracking which turns out may not have been correct. Had they suspected it was subsidence related at the outset, they would have made a claim in 2018, and they have gained no advantage not claiming earlier.

The corrective work as advised by the builder was completed on 17 August 2019 after the policy had renewed with the brickwork being removed, a lintel being put in and the brickwork being replaced. Mr H and Mrs H thought this had resolved the issue.

No further reports of cracking were made to Mrs H and Mr H until October 2022 despite other maintenance issues being notified to them in July 2020, and so it wasn't until the inspection report in October 2022 that the agent advised Mrs H and Mr H they would need to seek an expert opinion. As Mrs H and Mr H are not resident in the property, and live a long distance away from it, and I have seen no evidence that anyone advised them of the cracking worsening, I think it's reasonable that they didn't alert AEL any sooner.

And so I think it would be fair for AEL to treat the claim for subsidence as a late claim under the 2018-2019 policy, and to begin investigations into the subsidence.

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.

AEL have responded and accepted the provisional decision in as much as they have no issue with the claim being raised under the 2018/19 policy. But they have made some comments about my reasoning which they want recorded. They note that they don't consider I am qualified to comment on whether the cracks inside the property were concerning, that at renewal the broker has no obligation to advise a customer to make a claim, that they are not responsible for the builder's poor advice and that although Mrs H and Mr H live a long way from their property it doesn't absolve them of any duties to inspect and maintain it.

In response I would agree that I am not qualified to comment on the cause of cracks, but I was commenting in the context of whether a consumer may have found them concerning and I haven't suggested that AEL were responsible for the builder's poor advice. I understand that sales are non-advised by the broker, but if reporting stepped cracking at renewal is such a significant change that it triggers an exclusion, I would consider an insurer to then be on notice of a possible subsidence issue. In terms of Mrs H and Mr H's obligations, I consider that appointing an agent to manage the property and dealing with the repairs that were advised to them, they have acted responsibly in respect of their property. None of the above issues raised changes the outcome I have suggested.

Mrs H and Mr H have also responded. They have advised me that in order to protect their

property whilst this case was being decided, they have initiated some action in respect of the suspected subsidence. They have engaged a ground engineering company who have prepared a report and recommendations.

They have asked whether this affects my decision and how the case will be resolved. As I can only consider events up until 15 November 2023 when AEL issued their final response, I can't make any directions for anything beyond that date. However, AEL may wish to consider the findings of the report prepared by the ground engineers as part of their investigation and should liaise directly with Mrs H and Mr H regarding this and any proposed further investigations and work. If Mrs H and Mr H have incurred costs to date, these will need to be considered by AEL as part of that claim, and if there are any further disputes about this or any other aspect of the claim, that will need to be the subject of a further complaint.

And so for the above reasons, I'm making my final decision in line with my provisional findings.

Putting things right

To put things right AEL should

- Treat Mrs H and Mr H's subsidence claim as a late claim under the 2018-2019 policy and proceed with the relevant investigations and work as appropriate.
- If the investigations show that there is subsidence, AEL should reconsider whether it is fair to apply an exclusion for subsidence for the subsequent policy years from 2019/20 onwards.

My final decision

My decision is that I'm upholding Mrs H and Mr H's complaint and direct Amtrust Europe Limited to put things right as above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H and Mr H to accept or reject my decision before 3 March 2025.

Joanne Ward
Ombudsman