

The complaint

Mr D and Mrs D complain that Highway Insurance Company Limited (Highway) acted unfairly by avoiding their buildings insurance policy and refused to pay their claim.

What happened

Mr D and Mrs D had placed their buildings insurance via a broker (who I'll refer to as K) for around 40 years. In October 2021 their buildings insurance was due for renewal and K placed it with Highways.

In August 2022, Mr D and Mrs D noticed some cracking to their home. A claim was logged with Highways who carried out an inspection the following month. During the inspection Highway became aware of historic subsidence damage to the same area of Mr D and Mrs D's home which had been the subject of a previous claim in 2003.

Highway said when taking out the policy, the statement of fact asked whether Mr D and Mrs D's home and the surrounding area was free from subsidence. This had been marked as yes. Highway considered this had been answered incorrectly and was a careless misrepresentation, which entitled it to avoid the policy and refund the premiums paid.

Mr D and Mrs D brought their complaint to the Financial Ombudsman Service and our investigator thought it should be upheld. She said that there wasn't a dispute Mr D and Mrs D's home had previously been impacted by subsidence, but following repairs they hadn't seen any further signs of subsidence for almost 20 years until the summer of 2022. With that in mind, our investigator didn't agree the answer Mr D and Mrs D had given in relation to the statement about their home being free from subsidence was incorrect. She recommended Highway reinstate the policy and consider Mr D and Mrs D's claim.

Highway disagreed with this conclusion. It said the tree identified as the cause of both incidences of subsidence was still in place, so any mitigating repairs carried out didn't change the fact Mr D and Mrs D's property had not been free from subsidence. Our investigator didn't change her mind, so this case has been passed to me to decide.

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.

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.

I've looked at questions asked on statement of fact, Highway's underwriting criteria and what Mr D and Mrs D told us about their understanding of what happened during the first subsidence claim in 2003. Having done so, I've reached the same conclusion as our investigator. I'll set out why below.

Highway say Mr D and Mrs D failed to take reasonable care not to make a misrepresentation when they answered yes to the following question:

"Is the property free and surrounding area free from subsidence?"

When providing its file, Highway said the subsidence claim from 2003 hadn't been disclosed on the policy. It also said that in relation to the earlier claim, no mitigation repairs were carried out, only stitch repairs to provide stabilisation.

I'll start by addressing the point Highway made in its file that the previous subsidence claim hadn't been disclosed. But when considering the questions on the statement of fact, I can't see a requirement on the document for Mr D and Mrs D disclose previous claims. Based on the information provided to this Service, I'm persuaded Mr D and Mrs D acted incorrectly by not declaring the 2003 claim.

I'll turn now to the key point Highway raised and which led to the policy being voided. This is Highway's belief Mr D and Mrs D's property, and surrounding area, isn't free from subsidence. The primary basis for reaching this conclusion appears to be the fact the nearby beech tree (identified as the cause of both incidences of subsidence) hadn't been removed. This is because it's owned by the local authority.

We asked Mr D and Mrs D about the 2003 claim. They said they notified their broker, K, who liaised with their insurance company at the time to carry out repairs. Mr D and Mrs D summarised the repairs at their property for us. They said the driveway was dug up and a barrier installed to stop the roots, the drains were replaced and then there was some wire stitching of the wall. Mr D and Mrs D also told us about some internal redecoration. Mr D and Mrs D said they didn't see any signs of further damage to their home until they saw cracking in the summer of 2022.

Highway accepts there were some repairs carried out following the 2003 claim. It's referenced stitch repairs, noting these were intended to stabilise the property, but says the repairs didn't remove the cause of the subsidence or prevent further subsidence.

In communication with our investigator, Highway said its opinion that the answer to the question *"has the property been free from subsidence"* should have been answered as no. But Highway hasn't provided any evidence to show that Mr D and Mrs D were asked if their home had been free from subsidence. So, I haven't considered this question any further, focusing on the statements I can see were presented to Mr D and Mrs D. This being *"Is the property free and surrounding area free from subsidence?"*.

Highway's position is that Mr D and Mrs D's home wasn't free from subsidence because the tree identified as the cause of the subsidence hadn't been removed. But I'm not persuaded that's a reasonable stance to take. I say this because the statement of fact provided to them

didn't contain any definition for what Highway meant by "property" or "surrounding area". Nor did it give any guidance about what to say if a home had previously been affected by subsidence. And given what Mr D and Mrs D have told us about the remedial works carried out at their property in 2003, they understood the subsidence impacting their property to have been resolved by the installation of the barrier and repairs carried out at the time.

On this basis, I find myself persuaded that Mr D and Mrs D reasonably believed their property and surrounding area was free from subsidence following the repairs carried out following the claim in 2003 (and remained this way until August 2022) and took reasonable care when answering yes to the question in the statement of fact.

As I'm satisfied Mr D and Mrs D took reasonable care when answering "yes" to the question *"is the property and surrounding area free from subsidence"* it follows I don't consider there has been a misrepresentation and the actions taken by Highway are unfair and not in line with CIDRA.

Putting things right

To put things right I require Highway to reinstate Mr D and Mrs D's policy and deal with the subsidence claim in line with remaining policy terms. This may require Mr D and Mrs D needing to repay any premiums previously refunded by Highway.

My final decision

For the reasons set out above, I've decided to uphold Mr D and Mrs D's complaint and require Highway Insurance Company Limited to take the actions outlined in the "Putting things right" section of this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D and Mr D to accept or reject my decision before 23 April 2025.

Emma Hawkins

Ombudsman