

The complaint

Mr M and Mrs F complain that Red Sands Insurance Company (Europe) Limited (Red Sands) retrospectively removed subsidence cover from their home insurance policy and declined a claim.

What happened

Mr M and Mrs F purchased a home insurance policy online with Red Sands for a house they were buying. After moving in and redecorating the property, Mr M and Mrs F noticed cracks appearing both internally and externally, so they made a subsidence claim to Red Sands within the policy year.

Red Sands ultimately retrospectively removed subsidence cover from when the policy was taken out and declined the claim. Red Sands said Mr M and Mrs F had answered a question they asked about whether the property was suffering from cracking incorrectly when taking out the policy, and Red Sands said that if they had answered the question correctly, they wouldn't have provided subsidence cover from the outset.

Red Sands considered there to have been a careless qualifying misrepresentation, which they said, under the relevant law, entitled them to retrospectively remove subsidence cover from inception and then to decline the claim.

Mr M and Mrs F complained to Red Sands, but they maintained the claim decision. As Mr M and Mrs F remained unhappy, they approached the Financial Ombudsman Service.

One of our investigators looked into things and upheld the complaint. She said that she didn't think Mr M and Mrs F had failed to take reasonable care when answering questions at the point of sale. So, she wasn't persuaded Red Sands had acted fairly by removing subsidence cover or declining the claim. Therefore, the investigator said Red Sands should reinstate subsidence cover, deal with the claim subject to the remaining terms, and pay Mr M and Mrs F £300 compensation.

Red Sands didn't agree and asked for a final decision from an ombudsman.

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.

Red Sands thinks Mr M and Mrs F failed to take reasonable care not to make a misrepresentation when taking out their home insurance policy via an aggregator. This is because Red Sands say Mr M and Mrs F incorrectly answered questions presented about whether their property had suffered cracking when taking out the policy and if they had answered these correctly, subsidence cover would've been excluded. Red Sands concluded this was a careless qualifying misrepresentation, which they say under CIDRA allows them to treat the contract as if it had been entered into without subsidence cover. However, like our investigator, I don't agree Red Sands has taken a reasonable approach here. I'll explain why.

I've looked at the information Mr M and Mrs F were presented with when taking out the policy with Red Sands. There was a list of six assumptions, which included, of relevance here:

"My property has never had cracks on its external walls."

This then had an option to 'edit', to allow the part in bold to be amended if the statement was incorrect. As the list of assumptions was short, and in my view, they were clear and unambiguous, this was sufficiently presented for Mr M and Mrs F to be aware that they may need to 'edit' that particular assumption. I say this because shortly before taking out the policy in September 2022, Mr M and Mrs F had a pre-purchase survey carried out on the property. This noted (of relevance here):

"Parts of the render coating to all elevations are cracked. Therefore, I recommend you budget for hacking off the defective render areas and renewing at some stage soon."

It then went on to explain that cracking in external rendering can allow water ingress and suggested different methods to repair this.

It also outlined:

"There are noted to be some very minor fractures to the ceiling surfaces in various locations. These fractures are generally less than 1 mm in width; as such, they are considered to be minor and are not structurally significant. However, where fractures occur, you should ensure that they are filled with a suitable internal grade filler before redecoration."

And:

“Some evidence of minor historic structural movement was identified on the walls internally. This movement has manifested itself as small fractures to the wall surfaces in localised areas. However, it should be noted that virtually all properties are subject to a certain degree of building movement. Therefore, I would not consider the relatively minor fractures noted at the inspection time to be a significant defect. Nevertheless, where cracks occur, I would recommend they be filled with suitable internal grade filler, redecorated and monitored for future re-occurrence signs.”

So, whilst minor cracking and fractures to the surfaces were noted, these were not deemed structurally significant and simply required cosmetic works to put this right as a recommendation after property purchase. Having said that though, as the survey did indicate there were some cracks to the surfaces, this means the assumption presented above wasn't correct and Mr M and Mrs F needed to consider 'editing' it.

However, when using 'edit' to amend the assumption, this then brought up the following question:

*“Has your property ever had cracks on its external walls?
We only need to know if cracks have affected the main structure of your wall. You don't need to tell us about minor cracks that have affected render or plaster only.”*

This then gave the options of 'yes' or 'no'.

Mr M and Mrs F left this as 'no' as they believed this was the correct answer to the question presented based on the pre-purchase survey.

I don't think Mr M and Mrs F failed to take reasonable care when answering this, as I think they answered it correctly based on the pre-purchase survey. This is because the survey concluded all the cracks identified were only to the surfaces, weren't structurally significant, and were cosmetic in nature. And the question outlined that Red Sands only need to know if cracks had affected the main structure of the wall – which isn't what the survey concluded. So, I don't think they answered 'no' to this question incorrectly or unreasonably, or failed to take reasonable care when answering it as they did.

As I'm satisfied Mr M and Mrs F took reasonable care when answering the question, and that the answer they gave was correct, I don't agree Mr M and Mrs F made a misrepresentation when taking out the policy with Red Sands. Consequently, it follows that Red Sands hasn't acted fairly by treating this as a careless qualifying misrepresentation, or by applying the remedies under CIDRA when retrospectively removing subsidence cover, or consequently declining the claim on this basis.

With this in mind, I'm directing Red Sands to reinstate subsidence cover, and to deal with the claim subject to the remaining policy terms and conditions.

I should add here that Red Sands has also said that Mr M and Mrs F also misrepresented when taking out the policy because they answered the following question incorrectly:

“Is your house continuing to suffer from cracks?”

Which then gave the option of a 'yes' or 'no' answer. Red Sands say Mr M and Mrs F should have answered this question as 'yes', which would then have resulted in subsidence cover being removed.

However, Mr M and Mrs F weren't presented with this question during the sales process. This question is only brought up if the answer to the question above (about cracks on external walls) is answered as 'yes'. But Mr M and Mrs F reasonably answered this as 'no' as I've explained above. Therefore, they weren't ever presented with this question about *continuing to suffer from cracks*. Consequently, Mr M and Mrs F couldn't have answered this either correctly or incorrectly, as they simply weren't presented with the question in the first place. So, Red Sands can't rely on Mr M and Mrs F failing to take reasonable care in answering a question they were never presented with.

Red Sands has also referred to the following points in the survey and said that Mr M and Mrs F were aware of the potential for future subsidence as the property was built on clay soils:

"It should be noted that the property may have been founded upon shrinkable clay soils, which have the propensity to heave with changing moisture and climatic changes. Therefore, although I can state that there was no evidence of subsidence at the time of inspection, I cannot categorically state that the property will not be affected in the future."

But the questions Red Sands asked weren't about potential future subsidence, or the ground type, or if there was any increased risk for the future. Instead, Red Sands asked about cracking as I've outlined above, which I think Mr M and Mrs F answered reasonably.

Red Sands has also noted the following in the survey:

"We would advise that the trees and shrubs be managed according to BS 3998: 2010 (Tree Work Recommendations) to reduce the risk of adverse tree root action, excess ground desiccation, consequential damage to the foundations and underground services, etc. A competent tree surgeon/arboriculturist can provide further advice."

And Red Sands said Mr M and Mrs F failed to obtain an arborist report as recommended. But this wasn't suggested because subsidence was identified, and instead was for Mr M and Mrs F to consider any future risks that *may* occur ahead of purchasing the property. However, again, the questions asked during the sale were about cracking, not potential risk of future subsidence due to this. I accept Mr M and Mrs F may not have consulted arborists, but not carrying out these recommendations does not constitute a misrepresentation nor give Red Sands the right to amend the contract of insurance retrospectively.

Red Sands also referred to the documents provided post sale which said:

"The property has never had any cracks wider than 1mm on internal or external walls i.e. damage caused by subsidence."

Mr M and Mrs F's pre-purchase survey said:

"Throughout the property, the walls were tested with a 1 m spirit level and were generally level and even. I did not identify any significant fracturing or other significant building defects such as outward bulging or outward lateral rotation of the wall surfaces; as such, I believe that the main walls are stable and not suffering from any significant or inherent structural defects."

Along with:

“...I can state that there was no evidence of subsidence at the time of inspection...”

The survey didn't identify any inherent structural defects, subsidence or cracks bigger than 1mm to the walls (there was mention of fractures generally *less than* 1mm to the *ceilings* and only surface/cosmetic cracks to the walls and not to that width either) at the time of taking out the policy, so again I don't think this was incorrect.

For the reasons outlined above, I don't think Red Sands has acted fairly by relying on CIDRA, removing subsidence cover or declining the claim on this basis.

This has also been distressing for Mr M and Mrs F as they've faced uncertainty over potentially having to pay to have subsidence works completed at their home, when the cover, for the reasons explained, shouldn't have been removed from their policy by Red Sands. With this in mind, I'm also directing Red Sands to pay Mr M and Mrs F £300 compensation for the distress and inconvenience caused.

My final decision

It's my final decision that I uphold this complaint and direct Red Sands Insurance Company (Europe) Limited to:

- Reinstate subsidence cover to Mr M and Mrs F's policy
- Deal with Mr M and Mrs F's claim - subject to the remaining policy terms and conditions
- Pay Mr M and Mrs F £300 compensation

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs F to accept or reject my decision before 18 April 2025.

Callum Milne
Ombudsman