DRN-5741552

The complaint

N complains that ERGO Versicherung Aktiengesellschaft has unfairly declined a subsidence claim made for damage to its property.

What happened

N is a limited company and owns a property purchased in 2014, which had works completed on it in 2016. A policy was taken out with ERGO in August 2019 with a statement of fact being completed ahead of the policy inception.

A claim was made for subsidence damage in November 2020 and it noted the damage to the property was first noticed in July 2020. ERGO considered the claim and didn't think it needed to cover this. It said ERGO had failed to provide the correct information when the policy was taken out. This was in relation to the answer of two questions within the statement of fact. It said had these questions been answered correctly, it would have declined to provide cover for subsidence damage at the property. So, it said it was entitled to decline the claim now.

Our investigator looked at this complaint and didn't think ERGO needed to do anything else in response to the subsidence claim made. They said N had a duty to make a fair presentation of risk as a commercial customer under the Insurance Act 2015. They felt it had failed to do this when the policy was taken out and they were satisfied, had a fair presentation of the risk been made, ERGO would have removed any cover for subsidence from the policy at inception.

This meant there was a qualifying breach of the duty and ERGO was entitled to offer the policy on the terms it would have done. So, they didn't think it had acted unfairly when it declined to cover the damage later claimed for.

They did uphold the complaint in part as they felt there was damage to the property which may not to be subsidence related. They felt ERGO should reconsider the damage to this area of the property in line with the remaining policy terms and provide N an update on whether the claim would be accepted. They recommended that ERGO pay N £400 for the inconvenience added with this not being considered sooner.

N did not agree with the outcome reached by our investigator. They felt information hadn't been considered fairly and the questions answered in the statement of fact were answered correctly.

ERGO also disagreed with the assessment. It didn't think it was fair to say it had added inconvenience when it had failed to consider damage which was said to be unrelated to the subsidence within the claim that had been made. But it later agreed to consider this and provide an answer on the claim to N.

Because N and ERGO disagreed with the investigators outcome of this complaint, it has been referred for final decision.

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.

I appreciate that N will be disappointed by the outcome I have reached on this complaint, but I've decided to uphold the complaint in part, much like our investigator. I will explain why I think ERGO has fairly declined to provide cover for the subsidence damage to N's property. And why I think it did cause some avoidable inconvenience to N when failing to consider the other damage and provide an answer on this sooner.

N, as a limited company has a duty upon it when taking out insurance to make a fair presentation of the risk. This means it needs to disclose everything that it knows or ought to know, that would influence the insurers judgement about the risk. Or provide enough information to put the insurer on notice that it needs to make further enquiries about potentially material circumstances.

When the statement of fact was completed ahead of the policy being taken out, a number of questions were asked including the following which I've numbered for ease of reference:

*"**1.** Is the property and neighbouring properties in an area which has been FREE from signs of, and damage by Subsidence"*

The answer provided to this question was "*yes".*

And:

*"**2.** Has the property ever been repaired or monitored for cracking?"*

The answer provided to this question was no.

I've considered whether I think N answered these questions correctly. If it did, then it can be said to have made a fair presentation of the risk. If it did not, and I am satisfied that a different answer would have resulted in ERGO offering the policy but on different terms, it will be a qualifying breach and the Insurance Act 2015 is relevant here as our investigator set out.

I don't think question 1 and 2 were answered correctly when N said the property and neighbouring properties are in an area free of subsidence and N was aware of this. Or that it had never been repaired or monitored for cracking.

Ahead of the property being purchased, N had a Royal Institute of Chartered Surveyors (RICS) home buyers report completed. This looked at the whole property to highlight any apparent defects or issues either in the property or its area.

Sections E4 talks about the main walls and describes minor external cracks which it attributed to thermal movement. But it also said the following and highlights issues with the bay area of the property:

"Cases of subsidence have been known within this area.

I believe sub-soils in the area include shrinkable material such as clay which prone to seasonal variations which can cause structural movement as a result of shrinkage and expansion. Som properties in the area are affected.

There are signs the property has been affected by passed structural movement ad evidenced by cracking to wall surfaces and around openings, especially to the two-storey bay to front elevation."

I am satisfied that the information provided here shows that both subsidence has been known within the area and the property itself is not free from damage or signs of subsidence. And repairs for movement have been completed previously. While it isn't confirmed the historic movement was subsidence, it is information that indicates previous movement.

N has a duty to provide a fair presentation of the risk and disclose everything they know or ought to know that would influence the insurers judgement. Or provide enough information to put the insurer on notice that it needs to make further enquiries about potentially material circumstances. N did not provide a correct answer to the questions asked and I think it should have been aware of the area and previous damage to the property and it did not make a fair presentation of the risk.

To determine whether for the purposes of the Insurance Act 2015, the breach of the duty to make a fair presentation of the risk was a qualifying one, ERGO needs to show it would have acted differently. So would it have offered the contract at all, or on different terms.

ERGO has demonstrated that had the answers to the questions above been made correctly, its underwriting criteria would have meant it would have referred the policy to it's underwriters for a decision. And had a fair presentation of risk been made, it would have excluded the subsidence cover from the policy pending a structural engineers report.

N had a structural engineers report provided on 19 November 2019. This was not long after the policy was incepted and I think this is a fair indication of the property and its condition at the time of the insurance being taken out. I appreciate N has disputed this and says it cannot show the condition of the property at the time. But with ERGO's position being prejudiced when a fair presentation of risk was not made at inception, I think taking this report and its findings is fair. The report sets out why it was requested by N.

"This letter report has been prepared following your request to review several cracks that had formed at various locations at the above address to determine the severity, as well as proposing remedial measures"

The report also explains it has taken account of the other reports and trial investigations completed at the property previously.

The report details damage to the property and sets out what has happened to the Front Bay Area. It explains cracks were noted on either side of the bay and the floor had noticeably dropped from the underside of the skirting level in the hall. It details the cause of the damage with the following:

- *"Differing foundation depths: from trial pit investigations, the main front wall of the house has a foundation approximately 600mm lower than the bay foundation.*
- *The ground floor is formed with timber joists built on sleeper walls which do not have proper foundations and are built up from the oversite concrete below the ground floor void.*
- *Differential thermal movement of the internal timber partition walls to the main perimeter masonry walls."*

The recommendations made to permanently resolve this issue included the underpinning of the front bay to the same depth as the main front wall and replacing the supporting ground floor joists on the existing walls which have adequate foundations or forming new sleeper

walls on adequate foundations. It made other recommendations for more cost-effective repairs which avoided the need to complete the structural works.

ERGO's senior underwriter has considered whether, based on this, would it have provided cover for subsidence. It has confirmed subsidence cover would have been excluded from the policy. It would have deemed the property structurally unsound based on the findings of the structural engineer report and it has no appetite for clear and obvious potential subsidence which it feels was present here.

N has argued the property is structurally sound and while I acknowledge the report highlights its construction is not uncommon for similar properties of its age, I don't think the opinion of ERGO is unreasonable. It is the underwriter and able to determine whether the property meets its risk appetite criteria and has said this wouldn't have been accepted and the policy would have been offered without subsidence cover included. So even if there is areas of the report which N feels support movement to be minimal or within normal national guidelines, the opinion on whether to accept the subsidence cover with the policy is ERGO's to make.

Overall, I've not seen anything to show me ERGO has acted unfairly when it has said that N didn't make a fair presentation of the risk. It has demonstrated had this duty not been breached, it would have provided the policy on different terms and it follows, that it has not acted unfairly when declining to provide the cover for the subsidence and it is entitled to refuse to add this.

While I think ERGO has acted fairly when saying it cannot provide cover for subsidence, there is damage to the property which has been highlighted in later reports, not to be connected the damage at the front of the property. I will not go into this in detail as our investigator has set this out previously and asked that ERGO consider this damage separately and provide an answer to N on whether this is something it can consider, when reviewing the claim against the remaining policy terms. I think it is fair this is done and there has been a delay in this answer being provided.

I appreciate the impact of this claim and N's directors explained how this has caused a great deal of distress. But as our investigator explained as the eligible complainant is N, awards for distress cannot be made as it is a limited company. But I accept those involved with the running of N will have found this situation and the decline of the claim upsetting.

However, the delays in the other damage to the property being considered under the remaining policy terms will have added inconvenience to N and impacted its ability to carry out its normal activities and it is right this inconvenience is acknowledged. I agree an award of £400 to N to recognise this is made.

Putting things right

ERGO Versicherung Aktiengesellschaft should consider the damage to the rear of the property under the remaining policy terms and provide an answer on this damage to N.

To recognise the impact of this not being considered previously, it should pay N £400.

My final decision

For the reasons I've explained above, I uphold N's complaint in part.

Under the rules of the Financial Ombudsman Service, I'm required to ask N to accept or reject my decision before 6 October 2025.

Thomas Brissenden
Ombudsman