

The complaint

Ms D complains that Highway Insurance Company Limited (Highway) avoided her home insurance policy, declined her claim for water damage and that the time it took to reach its claim decision caused avoidable, additional damage to her home and contents.

What happened

Ms D raised a claim with Highway – her home insurance provider – for damage to her home caused by an escape of water.

Highway carried out checks when validating Ms D's claim, including looking into the occupancy of the property at the time of loss. Highway concluded that the occupancy conditions hadn't been met, and that there had been two misrepresentations about this at the point of the last renewal. Based on this, Highway avoided Ms D's policy and refused to cover the claim.

Ms D says she had plans in place to ensure that the property was visited and stayed in regularly, to meet the occupancy conditions of the policy. So, she disputed that she'd made any misrepresentations or breached the occupancy conditions.

Ms D also raised concerns about the time it took for Highway to reach its claim decision. She said she highlighted the worsening condition of the property and contents and asked permission to save what she could. But she says she was told she could only move items from the damaged parts of the house into the undamaged parts, and that she couldn't move any buildings debris. She says she moved what she was permitted to, but due to Highway's delays, severe mould developed throughout the property, meaning many salvageable items ended up beyond repair, and that the cost of repairs for both the buildings and contents increased significantly.

Highway accepted there were delays in reaching its claim decision, so it offered Ms D £200 compensation. But it said it wouldn't consider covering any consequential losses while it was carrying out necessary validation of the claim. Highway also maintained its decision to avoid the policy was correct based on the questions asked, answers given and the facts of the occupancy.

One of our investigators considered Ms D's complaint but didn't think it should be upheld. He said he was persuaded Ms D breached the occupancy terms and that she failed to take reasonable care to answer questions about this accurately when renewing the policy. So, he said the decision to avoid the policy was fair. He also thought the compensation offered for the delays was fair, and he didn't think it was possible to quantify what damage, if any, was caused solely because of Highway's delays. He said there was no evidence Highway told Ms D not to remove items either.

As no agreement could be reached, the complaint was passed to me to decide.

I was minded to reach a different outcome to our investigator. So, I issued a provisional decision setting out my thoughts, to give the parties the opportunity to respond before I reached my final decision. Here's what 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'm minded to reach a different outcome to our investigator. So, I'm issuing a provisional decision to give the parties the opportunity to respond, before I reach my final decision.

I'll explain my reasoning, addressing each issue in turn.

Misrepresentation

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.

I've reviewed the information from the October 2022 renewal. Ms D was asked the following questions (or to provide the following information):

“Property solely occupied by the proposer and members of his family

Maximum number of consecutive days unoccupied”

Ms D answered yes to the question about family and 30 days to the question about maximum days unoccupied. Highway says both these answers were incorrect, based on the actual occupancy of the property at the time of the loss.

Ms D's policy provides a specific definition for unoccupied which is:

“Unoccupied

Any period when your home is not lived in. By lived in, we mean slept in for at least five consecutive nights every month, or two consecutive nights every week.”

Highway says the property stopped being 'lived in' during November 2022 and so had been unoccupied for over 60 days at the point of loss in February 2023. Highway considered the schedule of visitors Ms D provided, but didn't agree that their visits amounted the property being 'lived in', and definitely not solely by members of Ms D's family.

I've thought carefully about all the evidence and arguments provided around this point. I agree with Highway that, as a matter of fact, the property didn't meet the definition of 'lived in' for over 60 days prior to the loss. But what actually happened isn't the consideration here, rather the consideration is whether Ms D failed to take reasonable care when answering the questions, at the time they were asked.

Ms D says she answered the questions in good faith and to the best of her knowledge at the time. She said some of the trips she ended up taking, which caused the property not to be lived in for as long as it was, were booked in at short notice significantly after the renewal. She also says she made plans to have the property regularly visited and stayed in during any absences, in order to meet the occupancy requirements of the policy.

Based on everything I've seen, I think an argument could potentially be made that Ms D didn't fail to take reasonable care when answering the maximum days unoccupied question – based on her reasonable belief about how long she would be away for at any one time – at the time the question was asked. But even if I were to accept this argument, I don't think the same is true for the question around who would occupy the property.

I say this because Ms D has said she made similar arrangements for people to visit and stay every time she'd be away for an extended period of time, which I understand is a fairly common occurrence due to her professional responsibilities. And looking at the plans she made for this period of absence, I don't think it can be reasonably concluded that the property would only be occupied by Ms D or members of her family. For example, many of the overnight visits she arranged were for friends, rather than family, and many of the non-overnight visits were from friends or contractors rather than family.

So, taking everything I've seen into account, I think Ms D made at least one misrepresentation, at the point of renewal, with regards to the occupancy of the property.

I'll now consider whether the misrepresentation Ms D made is a qualifying misrepresentation under CIDRA. To answer this question, I need to establish what Highway would have done if Ms D hadn't made the misrepresentation.

Highway has provided our service with its underwriting criteria. This information is commercially sensitive, so I'm not able to share it in its entirety. But as its material to the outcome I intend to reach, I'll summarise the key information.

The underwriting criteria shows that if Ms D had said the property would be occupied by people other than her family, that Highway would not have offered a renewal under any terms. This means Ms D's misrepresentation was a qualifying one under CIDRA.

CIDRA sets out the different remedies available to insurers when a policyholder makes a qualifying misrepresentation. These remedies are different depending on whether the insurer deems the misrepresentation as careless or deliberate or reckless. And it's for an insurer to show that a misrepresentation was deliberate or reckless if it seeks to rely on the harsher remedies available for those types of misrepresentation.

Highway has accepted that Ms D's misrepresentation was careless. And as the remedies for a careless misrepresentation are more favourable to Ms D than those of a deliberate or reckless misrepresentation, I'm satisfied it isn't treating her unfairly in the circumstances by considering the misrepresentation as careless.

The remedies available to insurers where there has been a careless misrepresentation depend on what the insurer would have done differently if the misrepresentation hadn't happened. In this case, Highway has shown that it wouldn't have offered a renewal under any terms. So, the relevant remedy in these circumstances allows Highway to avoid the policy back to the point of the misrepresentation and to refuse any claims made during the relevant policy period, but it must return the premiums. And this is what Highway has done.

As CIDRA reflects our service's long-established approach to misrepresentation cases, I think allowing Highway to rely on it to avoid Ms D's policy, and to refuse the claim, is fair and reasonable in the circumstances.

Damage and losses as a result of delays

Aside from Highway's decision to decline the claim and avoid her policy, Ms D has complained that the time it took to reach its decision caused her significant, foreseeable and avoidable financial loss. This is because the wet property became mouldy and the mould spread into undamaged parts of the house damaging parts of the buildings and contents which would otherwise have been salvageable, or cheaper to repair.

Highway says the losses Ms D is seeking to hold it responsible for are consequential losses suffered while it was reasonably assessing and validating her claim, and so are not something it would consider covering. It says the compensation it offered was only to reflect the time taken for its referral to, and decision from, the underwriters. Highway has also said there is no evidence to support that Ms D was told she couldn't remove salvageable items from the property.

I've thought carefully about all the circumstances and evidence provided around this point. Having done so, I'm inclined to agree with Ms D. I say this because I don't think Highway can fairly or reasonably accept responsibility for causing avoidable delays, yet separate out part of the impact these delays had on Ms D.

I fully accept that Highway needed time to consider and validate the claim, especially given the particular considerations required in this case. But Highway has accepted things took longer than they should have. Highway also knew the property had suffered an extensive escape of water and that Ms D was worried about the damage worsening – because she actively contacted it to ask permission to salvage what she could.

Highway has said there's no evidence to support that Ms D was told she couldn't remove undamaged items. But I've seen contemporaneous emails and phone messages which persuade me, on balance, that she most likely was. These communications support that she was told she could only move contents from the damaged parts of the house into the undamaged areas and that she couldn't move debris – apart from one portion in order to gain access to, and stop, the leak.

As Highway (and/or its agents) are the experts in insurance claims, I think it should have done more in relation to providing guidance to Ms D about what was happening with her undamaged contents, and what she needed to do to mitigate any damage. Highway would have known that cold and wet conditions within the property would likely cause mould to develop and spread, and that there was a significant risk of worsening damage the longer the claim took to assess. So, I fail to see why Ms D wasn't advised to save anything undamaged that she could, but to carefully document the condition of anything she removed prior to doing so. This would have likely meant the items could be saved, and/or repaired/cleaned at a lower cost and would not have prejudiced Highway's ability to consider the claim in the event the loss was covered.

So, based on everything I've said above, I'm intending to uphold this element of Ms D's complaint as I don't think Highway's blanket refusal to consider these losses was fair or reasonable.

Ms D has provided our service with lots of evidence she says demonstrates the losses she has incurred as a result of Highway's delays and the corresponding mould damage. But I'm not intending to carry out a full review of all the damage to Ms D's property to determine which damage was caused by the escape of water (and so isn't covered) and which has been caused solely due to Highway's delays and the secondary mould damage. I think that's for Highway to do in the first instance, now I've decided its decision to refuse to consider this up to now has been unfair.

Therefore, unless anything changes as a result of the responses to my provisional decision, I'll be directing Highway to consider Ms D's items, which were solely damaged as a result of remaining in her property after the escape of water, and any losses she can evidence arose solely due to this.

If my final decision remains the same as my provisional decision, then both Ms D and Highway will need to discuss the damaged items and losses, and Ms D will likely need to provide evidence to Highway to be able to consider this further. Highway will then need to make an offer to Ms D for those items it agrees suffered damage solely due to being left in a cold, wet property for an unreasonable and avoidable length of time, due to its delays and its failure to better support Ms D in preventing this, and any associated losses it accepts it is responsible for.

If Ms D remains unhappy with the settlement that Highway ultimately then offers, she'll need to raise this with Highway as a new complaint. Should she remain unhappy with Highway's hypothetical response that that stage, Ms D will be able to refer back to this service subject to our usual rules and timescales.

It's clear that having your home extensively damaged will be distressing in itself. But I think Ms D has been caused additional distress and inconvenience by her undamaged property suffering secondary mould damage, as a result of Highway's handling of the claim. Highway has already offered £200 compensation for the impact of the delays, but I don't think this goes far enough to compensate for the level of distress and inconvenience Ms D has suffered.

Ms D has explained that she had to continually chase Highway for updates on the claim and for permission to salvage undamaged items, which wasn't properly given. And that she had to eventually take the decision to go ahead and remove items without permission – which would have been a stressful decision to make, and sadly ultimately proved to be made too late. So, taking all this into consideration, I think Highway should pay Ms D a total of £400 compensation for the distress and inconvenience its poor handling of her claim and complaint have caused her.”

I asked both sides to send me any further comments or evidence they wanted me to consider before I reached my final decision.

Ms D responded to offer further comments on the occupancy of the property. In summary, she said:

- Highway accepted the property was 'lived in' when one of her non-family guests stayed in the property overnight.
- I seem to be suggesting that policyholders could not have family friends as overnight guests unless the owners were also present. She doesn't think any reasonable consumer would want a policy under such conditions.
- She has already sent Highway detailed photos of the worsening damage at varying stages of the claim.

Highway responded to explain it disagreed with my provisional conclusions around the secondary damage. To summarise, it said:

- It is unfair for me to allow Ms D to benefit from a policy which I've agreed has been avoided fairly, due to misrepresentation.
- A customer must act as though uninsured. There were three weeks between the event and the customer returning home. It believes this is the reason for the propagation and spread of the mould.
- The loss adjuster attended on 6 March 2023. The report highlighted the level of mould already present and suggested much of the contents would be unlikely to be salvageable.
- The evidence of messages I relied on are mainly between the broker and Ms D's property manager. It doesn't agree these messages support my conclusion that Highway advised Ms D she could only remove items from damaged parts of the house into undamaged parts. And one email from Ms D confirms the loss adjuster advised her to move items.

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've also thought carefully about the responses to my provisional decision, but having done so, my conclusions remain unchanged. I'll explain why, addressing each sides' responses in turn.

Ms D's response

I explained in detail within my provisional decision the reasons I felt Ms D had made a qualifying misrepresentation, so I don't intend to repeat those findings in detail. But I don't agree my conclusions have the effect of suggesting that Ms D couldn't have non-family guests staying at her property as Ms D has suggested.

Ultimately Ms D was asked clear questions about who would occupy her property and how long it would be left unoccupied at any one time. And taking into account all the evidence and testimony provided, I remain of the view that she failed to take reasonable care to answer those questions accurately.

So, my conclusions around the misrepresentation remain unchanged.

Highway's response

Highway says it is unfair for me to conclude it was reasonable for it to avoid Ms D's policy due to misrepresentation, but still allow her to benefit from the cover.

To be clear, I am not suggesting that Ms D should benefit from the policy. My provisional conclusions were that Highway should fairly and reasonably compensate Ms D for the avoidable secondary damage her property and contents suffered, solely as a result of the unreasonable delays which Highway itself had accepted responsibility for.

I don't dispute that some of the mould and water damage would clearly have been caused by the event and wouldn't reasonably be Highway's responsibility. But I think it's also reasonable to conclude that Highway's delays would have contributed to the level of damage and loss Ms D ended up suffering.

I've thought about Highway's argument that the loss adjuster suggested most of the contents would not have been salvageable from the outset. But I've also seen evidence that parts of the house were pretty much undamaged at the outset yet became damaged over time. So, I remain persuaded that Ms D has suffered some avoidable losses as a result of Highway's actions.

In terms of the messages, I accept that there isn't a message from Highway (or its agents) directly to Ms D advising she could only remove items into the undamaged parts of the house. But the evidence and testimony around this point is contradictory, and so I need to reach a conclusion on the balance of probabilities. That is, what do I consider is most likely, in light of the evidence which is available.

Ms D has been consistent in her testimony around this point, and I have found her both credible and persuasive. And given the messages I referred to are contemporaneous, rather than recent, I consider them more likely than not to reflect the position at the time. One of the messages, from 6 March 2023, mentions a conversation which took place that day in which the advice was to remove personal items from the damaged parts of the house into the undamaged parts. So, taking all of that into account, I remain persuaded that Highway (or its agents) failed to provide adequate support to help prevent avoidable further damage to Ms D's property and contents.

As explained in my provisional decision, I'll not be carrying out a full review of all the damage to Ms D's property to determine which damage was caused by the escape of water (and so isn't covered) and which has been caused solely due to Highway's delays and the secondary mould damage. I think that's for Highway to do in the first instance, now I've decided its decision to refuse to consider this up to now has been unfair.

So, if Ms D accepts my final decision, she'll likely need to liaise with Highway to provide any additional evidence it may require to calculate the extent of its liability and to make a fair offer.

Should a further dispute arise about how Highway proposes to settle this issue, Ms D will need to raise this with Highway as a new complaint in the first instance. Ms D may then be able to refer her concerns back to this service as a new complaint, should she remain unhappy with Highway's response, subject to our usual rules and timescales.

My final decision

For the reasons set out above, and in my provisional decision, I uphold Ms D's complaint in part.

Highway Insurance Company Limited must:

- Consider the items which suffered secondary damage as a result of remaining in the damp property, and any associated losses, subject to evidence substantiating this from Ms D.
- Pay Mrs K a total of £400 compensation for the distress and inconvenience it has caused her.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms D to accept or reject my decision before 10 April 2024.

Adam Golding
Ombudsman