

Before the Arbiter for Financial Services

Case ASF 114/2022

NZ ('complainant')

vs

MIB Insurance Agency Ltd.

(C 42111)

('service provider'/'insurer')

Sitting of 31 January 2024

The Arbiter,

Having seen the complaint, whereby the complainant disputes the insurer's decision to repudiate the claim lodged under the *Home Loan Insurance* for damages sustained to bridge and concrete columns, to the lounge soffit, and to the bathroom.

The complainant explained that they had to undertake urgent repairs on large cracks that appeared on various parts of their home, cracks that could potentially cause falling debris and thus were advised to remedy the situation immediately. She claimed that three separate independent persons, a waterproofing expert, two builders, and a retired architect, all agreed that the damages were caused by structural settling/movement of the earth, with this resulting in the cracking of the wall, of the waterproofing, and of the silicato treatment on various walls.

It was recommended that they strip the damaged areas and redo them entirely, whilst checking what kind of deeper structural issues could have resulted from such cracking.

The complainant admitted that it is uncertain when these cracks first appeared exactly, but they were noticed only in March 2020 when they were enlarged and clearly visible. Considering the shutdowns associated with COVID, they then had to wait until March 2021 for repairs to be carried out.

She explained that when some areas were stripped down, metal rods of beams were noted to contain some rusting which, however, were not deemed terrible or needed replacement, but *'When MIB heard that there were some rusting, this was used as a blanket excuse to deny our claim of home repairs due to "wear and tear".'*¹ Insisted that both the builders and the waterproofing expert agreed that the rust was in fact one effect resulting from the movement/settling of the earth and not the cause of the damages and at no point did anyone involved in the repairs carried out conclude that the noticed cracks resulted from the rust. The repairs consisted of several steps and the treatment for rust of some of the beams only constituted a small part of the works, not the entirety.

Reference was made to an email received from the service provider's representative, whereby she was informed that the claim with regards to repairs undertaken on the rusted concrete beams and columns cannot be entertained as rust take years to develop and the policy specifically excludes loss, damage, or deconstruction arising from wear and tear, and/or gradual deterioration. However, favourable consideration has been given to the damaged bathroom and kitchen soffits and proposed a settlement of €350 on a cash basis.

The complainant claimed to have *'... found this email to be incredibly disappointing. First of all, as anyone who has outside furniture can attest, rust does not take years to develop, nor was the rusting so extensive that any of the rods needed replacement. Instead, first the stripping of the cracked areas. Along with other works, the builders simply stripped the rust and put on a protective coating where applicable.'*²

Insisted that damages due to settling/movement should be covered by their insurance, particularly under Section 9 of the policy document which covers damages related to *Heave, Landslip, Settlement, and Subsidence*, under which the damages in question would fall.

¹ P. 3

² P. 3 - 4

Also, considering that only a small portion of the repairs were related to the treatment of rust, the complainant noted that instead of a blanket denial of their claim, they would have expected the insurers to subtract the costs associated with rust, that is, the cleaning and spraying of the rusty beams, which thus implies that other costs associated with cracking, sealing, and repainting, amongst others, would be fully covered under their insurance policy.

She noted further that, if the service provider is willing to cover costs associated with soffit damage and repair due to leakage, then it is logical that the damages associated with the cracking and consequent leakage to the bridge and columns would be covered too. Such decision was found to be dismissive and arbitrary, and not in line with the services expected by loyal customers for a long time.

In light of the above, the complainant expects:

'Compensation of the repairs that were necessary, broken down as follows:

1) Bridge and concrete columns:

- Damages due shifts in the concrete/structural settling, including cracking of silicate walls and waterproofing. The appearance of large cracks in the walls and ceiling, deemed to be dangerous to the persons living in the home.*
- Stripping of all Silicata inside and outside*
- Opening of all joints and cleaning of rust or other damages where appropriate*
- Treatment of all metal rods*
- Replacing concrete, plastering, painting and waterproofing inside and outside areas affected.*

Fixed Cost including all materials: Eur 3000 + VAT

2) Lounge Soffit: Water damage to the lounge soffit, due to a leakage on the upstairs balcony

- Repair of the upstairs balcony blockage*
- Painting of lounge soffit*

EUR 150 + VAT

- 3) *Bathroom: Water damage due to a leaking pipe*
- *Replacement and painting of bathroom soffit*

EUR 200 + VAT

*TOTAL: EUR 3350 + VAT.*³

Having seen the reply⁴ by the service provider which, in essence, submits that:

'Reference is being made to your letter dated 22nd September 2022, following a complaint lodged by NZ.

NZ & ZZ are insured under the HSBC Buildings block policy placed with Lloyds Insurance Company S.A wherein MIB (Malta) Ltd are the cover holder. MIB Management Services Ltd act as the Third-Party claims administrator as appointed by the insurer to deal with claims on behalf of the insurer. This was confirmed to NZ during our initial correspondence (as per attached email).

On the 12/02/2021 we were notified of a potential claim by NZ. On the same day we email NZ and asked her to submit the following documentation in order for us to start reviewing the claim:

- 1. ID card copy of policyholder;*
- 2. Photos of the sustained damages.*

On the 16/02/2021, ZZ informed us that an official report from the construction group was being prepared and was to be submitted to us within a few days. Meanwhile on the 19/02/2021 we informed ZZ that our architect Mr Alfred Grech was being appointed immediately to survey the damages. The survey was carried out by Arch. Grech on 22/02/2021.

The report was received on the 24/02/2021 and our office immediately notified ZZ that the case was being referred to the Underwriters and that another survey was to be carried out by our loss adjuster Mr James Magri in view that other unrelated damages were pointed out during the meeting with Arch. Grech. The survey by Mr Magri was carried out on 02/03/2021.

³ P. 5

⁴ P. 92

Attached please find a copy of both reports issued by Arch. Grech and Mr Magri, respectively.

Arch. Grech concluded that the damages relating to spalling and damaged concrete beam/column were as a result of poor quality of the concrete and water infiltration that causes the steel reinforcement to rust. Such damages take a long period of time to develop, which extend from 5 to 15 years.

The case was then referred to the Underwriters for their review and confirmed that based on the conclusions of Arch. Grech the claim relating to the damages to the concrete beam and column had to be declined in view that the policy is subject to a General Exclusion relating to “loss, damage or destruction due to or arising from wear and tear and or gradual deterioration.”

Attached is a copy of the policy wording.

Underwriters approved a cash settlement claim of €350 for the damages relating to the damaged bathroom and kitchen soffits following water ingress due to storm. These damages were unrelated to the other part of the claim which was declined.

Whilst trusting the above is in order, we look forward to hearing from you.’

Hearings

During the first hearing⁵ of 12 September 2023, the complainant declared that:

‘We have a house in XXXXX, it is a historical house of character that we bought in 201X. We’ve been insured with MIB since then. Every year we have the house waterproofed and checked and things like that. And since that time, it has always been done with the same provider, Ms Rose Rogers, who is a waterproofing expert.

Around December 2019, we started to have odd leaks happening in the house. We also had cracks that were visible in different parts of the house. Now, during that period of time, in 2019, we were away from Malta a lot. My father was XXXXXXXXXXXX and we were in XXXXXXXX a lot. And a lot of these damages

⁵ P. 147 – P. 153

were shown to me by my housekeeper which I sent to Ms Rose Rogers and she said that we had to look into this when we were back.

By the time that we were back, Ms Rogers came to look at the damages and she said, 'Look, there are a couple of things going on here'. I was most concerned -obviously, everything is concerning especially with leaking in our bedroom which is the old part of the house built with limestone – and significant cracks along the wall in the nursery room which is also the old part of the house, but what was most concerning were cracks that had appeared outside in the silicato treatment where we have like a new built part. It is like a bridge structure conservatory area. And those had started to make cracks on the inside, in the concrete. Ms Rogers said that this was something to look at immediately because the amount of cracking that happened from the outside was letting in so much water that this could lead to a very strong exacerbation of rusting and, of course, since concrete is porous, to the concrete expanding and spalling which could be very dangerous.

By March 2020, we had that happen and there were significant cracks visible. Ms Rogers is on a job today but she has written a statement which I request if I may read.

"31.05.2023

Good Day,

My name is Rose Rogers, my company is Unicorn Waterproofing and Plastering, and I have been waterproofing the home of NZ and ZZ at XXXXXX in XXXXXX since 201X.

I can confirm that around December 2019, NZ asked me to examine cracks that appeared internally and externally in various parts of her home.

Definetely for me, with 33 years of experience in examining cracks, areas of leaks and waterproofing homes, these cracks looked like they were caused by structural settlement due to the movement of the earth. Many of the cracks were resulting in leaking when there was heavy rain.

The cracks that appeared on the outside courtyard façade in the silicato treatment, were resulting in significant water seepage which I told her would

directly damage the internal structure of her bridge which contains steel bars. I advised her to call the builders to get this seen to. Due to the arrival of COVID, these repairs had to wait until February 2021. After the repairs were done by the builders, I examined the work and added liquid membrane where necessary as part of my yearly check and maintenance of the home.

From my experience, and being familiar with this particular house for over 10 years, the cause of the damages was the result from movement of the earth, which caused large cracks and fissures, and resulted in significant leaking and spalling.

Thank you,

Rose Rogers

Owner, Unicorn Waterproofing and Plastering”.

We had the builders come when it was possible; XXXXXXXXXXXXXXXXXXXX. That was the law at the time until February/March 2021 at which point the builders came. So, there were different areas that had problems. We had the bedroom and the upstairs area which they had looked at first. That wasn't as worrisome because it was made of limestone. We knew what was in there, they stripped the walls, they fixed all the joints and that stuff and then moved downstairs.

It was during downstairs, stripping off the concrete area that we had the first architect come and see the damages. I was there when the architect came, and he was not very communicative. He did not want to talk with anyone, he wanted to see for himself – fair enough. He looked around and did not stay for very long. He submitted a report that said that while he considered the leaks in the kitchen area, the lounge kitchen area, and the bathroom to be potentially covered, anything that had to do with the concrete and steel beams wasn't and he did no mention of the upstairs area at all.

He submitted an estimate of costs which was €8,643 which was almost three times as much as what we actually paid.

We then had a second person come and viewed the damages and what was going on. He was a Claims Adjuster (I forgot his name) from MIB. He was more

communicative and was very nice. He asked me for a receipt which I provided. The way the builders had done the damages, anything downstairs which had to do with soffit repair, they put in one bracket; and everything which had to do with the cracking and fixing, they just put as a lump sum of €3,000; and that is how I submitted the invoice.

The Claims said that it was difficult to tell me from then but they had the feeling that spalling would be excluded and I had asked them if I should redo the bill and ask the builders to sort of desegregate the different rooms. I was told that no, we could do that under the appeals process which I did but this had been ignored.

The builders also submitted a testimony:

“Date: June 15, 2023

To whom it may concern,

Ramon and I have been working as stone masons and builders for over 23 years. We have worked on the house XXXXXXXXXXXX since 2016 on several maintenance jobs and knew the house very well. The house is always kept in very good condition.

I can confirm that we carried out the repairs on this house in 2021, and that the damages consisted of several different items:

- 1. There were large cracks that appeared in different areas of the house. These were found in the outside walls and inside walls, including the bedrooms (master and children), the outside courtyard and then also on the concrete columns of the bridge. In my opinion, doing this work since over 23 years, these cracks occurred due to movements of the earth and then settling of the structure due to this movement. I know this house since 7 years, and to have many cracks like this occur in different parts of the house like this, is not common, and in my experience due to movement. It is not known when the cracks first appeared, but they became apparent to the owners when significant leaking occurred in different parts of the house, something which had never happened before. The cracks occurred in different materials as well, the bedrooms (which are original to the farmhouse) and made of limestone, which*

resulted in significant leaking. Then also in the silicato treatments on the façade of the courtyard. All these cracks resulted in significant leaking and damages.

- 2. There was the damage to the inside structure, in the concrete. This was seen in the concrete beams and bridge. In my opinion, most of these damages occurred due to the continued leaking of water into the structure from the outside cracks, which caused rusting and spalling. Due to COVID and XXXXXXXXXXXXXXXX, these repairs had to be delayed for 16 months.***

When we did the repairs we opened all the joints to check for damages and found that while most of the rods had some minimal rusting, which is not uncommon in a structure built about 15 years ago and the damp, only two places had significant rusting and spalling. These significant areas of rusting and spalling were located where leaking had occurred due to the damaged façade wall cracks, running in long vertical and horizontal lines only. Again, from my experience, this is caused from shifts/movements in the earth. We removed the rusting where necessary and treated the beams. The areas with minimal rusting had no cracks and also no spalling.

When the insurance Perit came to see the works, we had already fixed all the damages from the 1st point and most of the 2nd point, and only had the two severely affected areas of the concrete column and bridge left to do. It was only on these damages that the Perit took notice of and spoke to us about.

For points 1 and 2 we stripped all the silicato, plastering and concrete, opened all the joints, fixed all the pointing and repaired all the concrete, plastering and silicato treatments, and charged NZ a flat fee of Eur 3000 + VAT.

- 3. There were damages from leaking in the downstairs bathroom and leaking in the main lounge, which damaged the soffits. Ramon and I repaired these damages as well, opening the soffits and joints, and replastering the ceilings. For these two areas e charged Eur 350 + VAT.***

Thank you,

Robert Cassar”.

Why did we file this claim? First of all, we were so confused as to why the first architect submitted such an estimated cost which was almost three times as much as it actually was.

We questioned the blanket denial of what happened on the 9/8 and this was after we wrote our appeal and said, “Look, there wasn’t just rusting. There were a lot of other damages that happened.” And we detailed those. And we just got, two months later, that the underwriters did not change their mind. And I wrote back to Pearl and asked her to please explain as I did not know why I am getting such different opinions on this and I got no reply.

On the 28/8/2022, I emailed and got no reply which is when we then moved this for mediation. During mediation, when they asked me for expert testimony, and I said that of course I can, and I submitted these expert testimonies and, again, there was no communication; there was no feedback on why these were rejected. And when I wrote again for them to send me their replies so that I would understand what was going on, I got no reply. I followed up on this again and then I got a reply that said, “No, we are not going to share this information with you. It will be shared with the Arbiter only.”

The service provider does not have any questions for the complainant.

The Arbiter asks the service provider when was the insurance first approached on this claim, Mr Josef Galea says that it was in 2021.

NZ confirms that the defect first appeared in 2020 and that she couldn’t do anything about it because of COVID and other issues and she started addressing it in 2021.

Asked by the Arbiter whether in that gap the insurance were not involved at all, the complainant says,

“No; looking back at it now, it might seem strange to people, but, at the time, it was such a crazy time: schools shut; I was XXXXXX; COVID, we were not allowed to leave the house; XXXXXXXX. When the builders said that they could come, that was when we also contacted the insurance.”

Asked by the Arbiter when the architect who was commissioned by the insurance came to make his inspection whether the remedial action had already started, the complainant says,

“No; it was already under process and some of it had already been done. Upstairs had already been done; the downstairs, outside, had already been done. Some of it had already been done. Again, I did not realise that all these things had to be separated out in this way. I did not realise that every single different area had to be ... I’d thought he’d come and see the problem, we’d chat about it and that was it. I say this is my first experience.”

NZ confirms that there is a claim for €3,000 + VAT which is under dispute; and what we are talking about in this complaint is this €3,000 job.’

Following the hearing, the service provider’s submissions were to be submitted in writing with the same being then notified to the complainant.

By virtue of an email⁶ dated 11 October 2023, the service provider stated:

‘We hereby re-confirm that underwriters have declined the claim on the basis of the loss under review being the result of gradual operating causes which is a general exclusion under the policy as outlined in the initial submission by this office in reply to the complainant’s claim.’

A report⁷ compiled by Perit Alfred Grech, the insurer’s appointed architect, and an email⁸ from Mr James Magri, the Loss Adjustor, were also submitted in reply to the testimonials submitted by the complainant during the previous hearing.

During the second hearing of 21 November 2023, Perit Alfred Grech confirmed⁹ the report that was presented for the case in question.

When cross-examined, he stated that:

‘Asked whether I had conducted any tests on the complainant’s house, I say that when an architect goes on site, if he notices that there are subsidence cracks, the first thing that he does is that he alerts the owner of the house

⁶ P. 164

⁷ P. 167 – P. 171

⁸ P. 172

⁹ P. 174

telling the owner of the house that he/she has very serious cracks which need to be investigated further.

Then the architect will ask the owner of the house if he/she is prepared to let the architect carry out tests. This will include two tests:

He gets in a core driller and he drills cores in that beautiful lounge that the complainant has and outside so that he could extract the cores from the rock to see whether the rock is strong. If the rock is strong, then, probably, the foundation is weak.

So, he will ask you again whether you will be prepared for him to bring a mini digger and he digs right down to the foundations to inspect those foundations both inside and outside.

Once he determines that, for example, there is either a weak rock or else a weak foundation, then he will ask you, "I need to get a geotechnical engineer to tell me how to sort this out."

But I, as an architect, with 45 years' experience, I know when I go into a house, God forbid, if there is subsidence.

I say that the few cracks that I saw were alluded to building movement. Now why does a building move? The only reason why a building moves is if you have, God forbid, subsidence. There is no other reason unless there is an earthquake, but an earthquake means other houses are affected.

I say that the complainant should get a substantiated architect's report and if he says that the cracks are due to other cause, I will relent.

The confirmation of what I am saying was given to me by the complainant, by the invoice. The invoice says, "clearing of the rust". Why is there rust if there are cracks?

"Metal rods". What is meant by metal rods? And then, obviously, plastering. The only problem that the complainant has is weak concrete. The complainant claimed to have repaired those columns; she has a beautiful house, but the new part has weak concrete and bad workmanship. That is why this happens. I see about ten cases like this every month. That is her problem, and that is what she is claiming for.

The complainant is claiming €3,000 to repair this rust; that is what she is claiming for.

It is being said that the cracks were outside, they were in the foundation and that she sent me pictures and that these parts were already fixed when I went. And that the cracks in the limestone were already fixed when I went.

I say that the invoice she has for €3,000 is for the repairs of the concrete.

It is being said that it was not just in the concrete area; it was the bedroom, it was the nursery which are made of limestone and that she keeps saying this over and over.

I say that there were two things there:

- 1. There was spalling, and***
- 2. There were some cracks.***

With regards to the spalling, we all know why it happened: 1) bad quality of concrete and 2) bad workmanship.

If you have minor cracks in the house, unless you can prove it is subsidence, - I've got an old house, I have cracks, but they are not subsidence cracks, they are movement cracks.

It is being said that they were movement cracks which led to leaking and that the complainant had to repair them.

I say that this takes over ten years, which is rising from the ground. This column is inside. Where is the water coming from?

***I urge the complainant to get an architect report not from people who do not know. Not from a mason or a waterproofing contractor. The complainant needs to get a warranted architect's report and I will not challenge him.'*¹⁰**

Also, 'Mr Josef Galea, for the service provider, would like to clarify that the building policy has a specific cover for subsidence. And in this case, it is not considered as subsidence.

***Normal settlement of property is not an insured peril, and this was also made clear in the repudiation email made by the loss adjustor. Normal settlement movement is not an insured peril.'*¹¹**

¹⁰ P. 174 – P. 176

¹¹ P. 176

The complainant's spouse has then presented the final submissions¹² for this case on behalf of his wife, whereby he submitted that:

'...

All evidence, including pictures and written statements by Ms. Rogers and Mr. Cassar have been submitted regarding leaking that occurred in our home. As a closing statement, a number of points need to be reiterated:

- 1. We have never claimed that our home has weak foundations. We also never claimed that our property in XXXXXX has been subject to subsidence, i.e., the caving in or sinking of an area of land, as the report and testimony of the Architect refers to. While a qualified architect with a specialization on geotechnic engineering would be necessary if our appeal claim was based on the catastrophic event of subsidence, this has never been our claim anywhere throughout this process.***
- 2. Instead, and in line with the expert opinion of Mr Cassar and Ms Rogers, who have submitted their testimonies and photographic evidence, we maintain that the damages that led to leaking in our bedroom, the nursery and the façade of the courtyard were due to cracks caused due to movement of the earth. This movement could be due to a variety of reasons that are not predicated on catastrophic events such as subsidence. Instead, the various tremors/minor earthquakes that Malta has experienced during the time of the damages can certainly account for cracks as we had. However, we as the insured client can never know 100% what caused cracking. What we do know 100% is that we noticed cracks, those cracks led to leaks and those leaks caused damages that needed repairing.***
- 3. I would like to emphasize that Mr Cassar, with over 23 years of experience in building, and Ms Rogers, with another 33 years of experience in working on limestone and concrete leaking analysis and repair, are more than qualified and knowledgeable to assess and communicate the causes of what constitutes minor cracks and leaking as we sustained, the total damages of which reached EUR 3350.***
- 4. For MIB to claim in the final session that damages due to earthquake tremors are an impossibility since other homes nearby would have***

¹² P. 177

sustained damages of a similar type is incongruous on a number of points:

- ***First, MIB is aware that neighboring properties have sustained such damage. See for instance ASF 075/2021.***
 - ***Secondly, other people's properties have absolutely nothing to do with our case or our property. It is not our job to canvas XXXXXXXX looking for homes that sustained cracked pools, cracked wells or cracked bedrooms. Every home is different, and our home, which is insured, sustained cracks which led to leaking and damages. Those damages happened in our bedroom, in the nursery, in the courtyard façade (which leaked into the concrete structure) and at a later date, in our spare bathroom and out lounge.***
- 5. It has appeared to us from the outset that our insurers assume a familiarity by their clients with the processes of filing and appealing of insurance claims that simply, and not unnaturally, is not the case. Procedural errors on our part have been used to dismiss our case. The most important one refers to the billing which has been used to blanket dismiss the majority of the works done. I wish to highlight the following one last time:***
- ***As Mr Cassar explained, for all the damages that occurred prior/during to covid, a flat fee of EUR3000 was offered. This included the façade of the courtyard and the two bedrooms, which were done first to stop further damages in our bedrooms and to the concrete columns.***
 - ***For damages that occurred subsequent to Mr Cassar's first inspection and 3K quote, namely the lounge and the bathroom leaks, separate rates were charged at Eur 150 and Eur 200 respectively.***
 - ***Consequently, the damages/repairs were separated by time of occurrence, not due to causes of the damages, or the materials that sustained damages (soffit vs. limestone vs. concrete).***

- ***The bedroom and the façade areas were already fixed, and were pointed out as being fixed, when MIB sent the architect and the adjuster.***
- ***Being unfamiliar with the billing process, we, the home owners, created an itemized bill of the 3000 eur flat fee and roughly listed what the builders were doing after chatting with them. We did not know that rooms needed to be listed separately, or that the finding and listing of rust would be used to blanket dismiss our claim. That the EUR 3000 included repairs done to the bedroom, the nursery and the courtyard façade has been explained from the beginning of our appeal. Repairs relating to rust and spalling, were a part of the works done, and not the total of the works done. This has been corroborated by both Mr Cassar and Ms Rogers, who also submitted pictures as proof.***
- ***Finally, our experts, who know our home for years, stand by their assessment that the rusting and spalling of the concrete were a result of the leaks sustained from the façade, which could not be addressed for over a year due to the pandemic.***

Thank you for your time and consideration.¹³

The service provider has then submitted that:

‘We refer to the above-mentioned case and the closing statement by ZZ.

We do not wish to repeat what was already explained in detail in the previous sittings, and our reply to the initial complaint, however we would like to highlight 3 main points which led to underwriters’ declinature:

- a) The HSBC Property Policy covers named Perils as detailed in the policy document.***
- b) The claim was made for three difference damages, as can be evidenced in the attached document, provided during the survey held on site on 02/03/2021 – the Bridge & Concrete columns; Lounge Soffit & Bathroom. Both the lounge soffit and bathroom were confirmed, and settlement***

¹³ P. 179 – P. 180

offered, as these were treated as separate incidents, which damage was caused by covered perils, namely accidental damage and escape of water which happened sudden and unforeseen.

- c) The damages caused by rusting and spalling of the bridge and concrete columns were declined due to the policy exclusion namely, gradual deterioration as explained in Arch Alfred Grech's reports dated 24/2/2021 and 23/6/2023. Without repeating, should there have been earth movements, the property would have suffered large cracks which were not evidenced during both surveys carried out by the Architect and Loss Adjustor, respectively. In addition, the conclusion of Arch Grech's report dated 24/2/2021 were never challenged by any other architect.*

Finally, may we also mention that the merits of case ASF 075/2021 referred to by ZZ are completely different from what is under review in this case.¹⁴

We await the final decision.¹⁵

Having seen the statements by the complainant

Having seen the statements by the service provider

Considers

The complaint mainly revolves around the main cause of the damages sustained by the bridge and concrete columns, the lounge soffit, and the bathroom, and whether these are covered under the *House Loan Building Main Insurance Policy*.

The Arbiter shall determine and adjudge a complaint by reference to what, in his opinion is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.

¹⁴ The Arbiter concurs with this view as Case ASF 075/2021 dealt only with the consequences of a delay in notifying the insurers about the event leading to the claim, which is not the main issue of this claim.

¹⁵ P. 182

Primarily, the Arbiter notes that the service provider offered settlement in respect of the damages to the lounge soffit and the bathroom which therefore does not seem to be in dispute any longer.

The service provider confirmed that:

*'Both the lounge soffit and bathroom were confirmed, and settlement offered, as these were treated as separata incidents, which damage was caused by covered perils, namely accidental damage and escape of water which happened sudden and unforeseen.'*¹⁶

Hence, it is the damage to the bridge and concrete columns which remains in dispute.

The complainant claimed that large cracks appeared in various parts of their home, with such cracks having the potential to cause falling debris and, due to this, they were advised to remedy the situation immediately. In the complaint form, she stated that it was in March 2020 that despite being uncertain when these cracks appeared, they were noticed when they were enlarged and thus clearly visible at that time.

On the other hand, during the hearing of 12 September 2023, she admitted that

*'Around December 2019, we started to have odd leaks happening in the house. We also had cracks that were visible in different parts of the house.'*¹⁷

The Arbiter notes that despite noticing the cracks around December 2019, and they were, at that time, advised to remedy the situation immediately, they still failed to take the necessary actions till March 2021, that is, more than a year later. The complainant argued that in 2019, they were away from Malta due to her father being diagnosed with cancer. Eventually, in 2020, repairs could not be carried out due to the shutdowns associated with COVID and, also, herself being vulnerable XXXXXXXX.

Whilst the circumstances can be understood and fully empathised, the Arbiter cannot help but comment on the fact, as admitted by herself, that due to the damages sustained, repairs were considered urgent, despite the country going

¹⁶ P. 182

¹⁷ P. 147

through difficult times because of the COVID, certain works still could have been carried out.

The Arbiter believes that despite the complainant being concerned about her toddlers and the potential of falling debris resulting from the cracks, she still failed to take the necessary actions to repair the damages sustained in the earliest manner which, eventually, goes against one crucial principle in insurance, that is, to try to minimise the losses and act as if uninsured.

The service provider noted that it was notified of the loss on 12 February 2021. The claim form was eventually submitted two days later, on 14 February 2021. On 19 February 2021, the complainant was informed that the architect was being appointed who eventually visited the complainant's property on 22 February 2021. The architect's report was then drawn on 24 February 2021.

The complainant confirmed that it was around February/March 2021, when the builders carried out some of the required work, whilst also noting that

*'The bedrooms and the façade areas were already fixed, and were pointed out as fixed, when MIB sent the architect and adjuster.'*¹⁸

In this case, the Arbiter notes that there weren't any delays or procrastinations from the service provider's end. In a matter of days since the claim notification, an architect was appointed, visited the premises and, eventually, drawn a report.

In this respect, the Arbiter fails to understand the reason why some of the required repairs had already been carried out. Considering that the matter had been recurring for over a year, carrying out the necessary repairs or delaying the matter by a certain day for the service provider to follow the claims procedure surely would not have made any difference.

Without prejudice to the above, the Arbiter notes that the main issue being disputed is what caused the cracks, with the complainant claiming to be due to structural settling and/or movement of the earth and the service provider arguing that these were caused by rusting and spalling of the bridge and concrete columns.

¹⁸ P. 180

The service provider presented a copy of the reports drawn up by the architect, both the survey report¹⁹ and a technical report²⁰ in reply to the submissions by the builders and waterproof expert appointed by the complainant.

In the survey report, the architect explained that the cause of damage, that is, the spalling of concrete, '*... is the result of presence of water (dampness) within the concrete column or beam*',²¹ which dampness can be caused by the various factors explained in the same report. He explained further the effect of such dampness on the steel reinforcement and how rust is developed and the latter's effect on the steel and eventually on the concrete.

He also emphasised that such process is accelerated by '*... poor quality of concrete and the reinforcement being too close to the surface*',²² and, also, that the '*... said process is the result of long term conditions due to the causes mentioned above which can extend from 5 to even 15 years.*'²³

In reply to the builders' and waterproof expert's reports which focused mainly on the fact that the visible cracks were caused by structural settlement due to movement of the earth, the architect explained²⁴ in certain detail what are the major causes of building subsidence and what would have been noticed in the building in such cases.

During the cross-examination, he also explained the procedure to be followed in case any subsidence cracks were noticed during his visit on site.

Considering the above, the Arbiter strongly feels that the reports and explanations submitted by the architect in this case are more detailed, professional, and hence more credible. Despite indicating that the damages in question were caused by structural settlement due to movement of the earth, both the builders and the waterproof expert failed to provide the necessary reasons substantiating such conclusions. When compared to the architect's affirmations with regards to the reasons why same damages could not be

¹⁹ P. 100

²⁰ P. 167

²¹ P. 101

²² *Ibid.*

²³ *Ibid.*

²⁴ P. 169

attributed to the structural settlement due to movement of the earth, the builder's and waterproofing expert's reports were less persuasive.

The Arbiter notes that whilst in her complaint the Complainant had mentioned that *'one retired architect had (all) agreed (separately) that the damage was caused by structural settling/movement of the earth, resulting in the cracking of the wall, waterproofing, and of the silicata treatment on various walls,'*²⁵ no evidence from such source was presented. The Arbiter further notes that Architect Grech in his evidence had urged the Complainant to present such evidence.

'I urge the complainant to get an architect report not from people who do not know. Nor from a mason or a waterproofing contractor. The complainant needs to get a warranted architect's report and I will not challenge him'.²⁶

In this respect, based on the architect's conclusion in relation to the poor quality of concrete referred to above, and the fact that what caused the damage could extend from five to fifteen years, one the General Exceptions which thus applies to the whole policy, is applicable in such case:

'We will not be liable under this Policy for loss, damage or destruction:

...

*c) Due to or arising from wear and tear, mechanical or electrical breakdown, failure or breakage, depreciation, gradual deterioration, inherent defect, mildew, rain, mist, or normal atmospheric conditions, moth or vermin, any process of cleaning restoring, renovating, repairing, erecting or dismantling; overwinding, bad workmanship, lack of maintenance ...'.*²⁷

In light of the above, the Arbiter cannot uphold the complaint and is thus unable to impose on the service provider to offer any amount higher than what has already been offered.

²⁵ P. 3

²⁶ P. 176

²⁷ P. 75

Each party is to bear its own costs of these proceedings.

Alfred Mifsud
Arbiter for Financial Services

Information Note related to the Arbiter's decision

Right of Appeal

The Arbiter's Decision is legally binding on the parties, subject only to the right of an appeal regulated by article 27 of the Arbiter for Financial Services Act (Cap. 555) ('the Act') to the Court of Appeal (Inferior Jurisdiction), not later than twenty (20) days from the date of notification of the Decision or, in the event of a request for clarification or correction of the Decision requested in terms of article 26(4) of the Act, from the date of notification of such interpretation or clarification or correction as provided for under article 27(3) of the Act.

Any requests for clarification of the award or requests to correct any errors in computation or clerical or typographical or similar errors requested in terms of article 26(4) of the Act, are to be filed with the Arbiter, with a copy to the other party, within fifteen (15) days from notification of the Decision in terms of the said article.

In accordance with established practice, the Arbiter's Decision will be uploaded on the OAFS website on expiration of the period for appeal. Personal details of the Complainant(s) will be anonymised in terms of article 11(1)(f) of the Act.