

The complaint

Mr W's complaint is about Aviva Insurance Limited's handling of a subsidence claim made under his home insurance policy. Mr W is also unhappy with Aviva's proposed method to repair the damage caused.

All references to Aviva include its appointed agents.

What happened

I will set out the key events in brief below which are relevant to my decision. However, I want to reassure both parties that I have read, and carefully considered, the substantial submissions which have been provided.

Around 2011, Mr W noticed some cracking in his property and notified Aviva. Aviva appointed a loss adjuster to investigate the damage.

The loss adjuster concluded that the damage was settlement, so Aviva turned down the claim and Mr W arranged the required repairs. Mr W says that the loss adjuster requested the cracks be filled and monitored for a 12-month period. And he added there was no further damage seen in the following 12 months.

Mr W extended his property around 2015. And around 2017 he noticed further cracking to the property. He notified Aviva around 2018 and again it appointed a loss adjuster to investigate the damage.

Following site investigations, it was concluded that the damage was linked to subsidence caused by clay soil shrinkage. And the cause of the ground movement was linked to a tree in the neighbouring property.

It was agreed that removing the tree would prevent further ground movement to Mr W's property, but the third-party were concerned of the heave risk this could cause to their own property.

Further investigations and expert reports (which I'll refer to later) were commissioned by both parties to ascertain the heave risk to the third-party property and to determine the scope of repairs required by Aviva to Mr W's property.

Around April 2020, Aviva set out its proposal to install a root barrier between the properties and prepare a schedule of works to repair the subsidence damage. Mr W was told "*It has been accepted the neighbours...tree will remain in place.*"

Mr W didn't agree with Aviva's proposed method of repair and instructed a structural engineer (J) to provide a report on the claim. J's report concluded that tree removal was the best option, as in his opinion, the root barrier would have a limited lifespan, and the tree roots could continue to cause problems to Mr W's property foundations.

Aviva continued to liaise with the third party to either get the tree removed, or to carry out a heave assessment risk on their property but were unsuccessful. So, around January 2021,

Aviva reverted to its proposal to install a root barrier and repair the damage to Mr W's property. But Aviva turned down part of Mr W's claim for subsidence damage to his patio. It said the foundations were of defective design and not covered by Mr W's policy. Aviva did offer Mr W an ex-gratia payment to repair the patio surface but said that this wouldn't cover any repairs required to the patio foundations.

Mr W didn't agree, so around February 2021, he engaged J's services again. J visited the property and provided a further expert report. J concluded the damage to Mr W's property fell into the 'severe' category and didn't support the approach of a root barrier over removing the tree. J concluded that in order to provide an effective and lasting repair to Mr W's property, the only two options that would lead to a permanent solution would be either the tree removal, or "*alternatively the extensive underpinning*" of Mr W's property.

Around the same time Mr W complained to Aviva and it provided its final response. It maintained its position that a root barrier would be an effective solution to the ground movement and it also maintained its decision to exclude the patio repairs from the claim. So, it didn't uphold Mr W's complaint.

Mr W disagreed with Aviva's response and referred the complaint to our service. In summary he asked our service to consider the following points:

- The assessment and outcome of his insurance claim in 2011 was incorrect.
- The solution to install a root barrier is suboptimal and would result in further and ongoing damage to his property.
- The proposed repair to his property did not include underpinning.
- Aviva's decision to exclude the patio from the claim.
- Reimbursement for J's expert reports.

Our investigator looked at everything and recommended the complaint be upheld. They concluded that Mr W's 2011 claim was most likely unrelated to the 2018 claim. And they concluded that Aviva had taken reasonable steps during the claim to get the neighbour's tree removed. But they weren't persuaded that a root barrier would lead to an effective and lasting repair based on the expert reports provided. So, they recommended Aviva underpin Mr W's property in line with J's recommendations and reimburse Mr W £510 for one of J's reports. And pay Mr W £200 compensation for some trouble and upset caused.

Our investigator provided a further recommendation to the parties in relation to the patio. They concluded that Aviva hadn't fairly shown the foundations to the patio were defective. So they recommended that Aviva either reconsidered this part of the claim by visiting the property to measure the depth of the patio foundations, or if it was unable to show this, to settle the claim and include the patio in the repairs to the property.

Aviva didn't agree with our investigator's findings and asked for an ombudsman's decision.

Both parties provided further comments to be considered.

Aviva said, in summary:

- The third-party defence for not removing the tree was based on assumptions and not factual evidence. So, it wasn't persuaded that the third-party had demonstrated there would be too great a heave risk if the tree was removed.
- It didn't agree that a root barrier should be ruled out based on an arboriculturist report (P). It said the property layout didn't preclude this from being a viable repair scheme

on the information available. Aviva concluded that it firmly believed a root barrier could be installed to provide a lasting repair to the subsidence damage.

- In July 2021, it had offered to instruct an independent engineer to assess the damage and scope of works with a view to making the recommendation final and binding on all parties, but Mr W had rejected this.
- Whilst it didn't think underpinning was required in any event, if it were to be directed by the ombudsman it should be localised to the areas of damage only, as underpinning of the entire property would amount to betterment and be a preventative measure.
- It didn't agree that J's report was persuasive in changing its decision of repair method so didn't think it should be liable for the costs of Mr W seeking an alternative opinion.

Mr W said, in summary:

- That he maintained Aviva's decision on the claim in 2011/12 was incorrect.
- Aviva has had opportunities over the last two years to instruct further factual reports or investigations but hadn't done so.
- He was concerned that Aviva are now questioning reports and opinions that it paid for and hadn't questioned previously.
- That the loss adjuster's appointed engineer had recommended either a root barrier or underpinning, but Aviva has only ever discussed the root barrier option with him. He said that the expert reports provided show that the root barrier would not be an effective and lasting repair.
- He had rejected a further independent engineer's option as he had already instructed and paid for one himself. Mr W added that Aviva had made no effort to resolve the situation prior to this offer when it could've done so much earlier in the claim.
- The entire property would need to be underpinned because it had been shown that the newer parts of the property were also being affected by tree movement. And he pointed to the loss adjuster's appointed engineer's comments, which stated that if the original construct only was underpinned then this could give rise to differential movement and ongoing damage to his property.
- He had paid over £1,900 in professional fees for J's reports and wanted this money reimbursed, as Aviva had used J's comments in responses to our service, and further used J's feedback to adjust the level monitoring points in the property.
- He feels Aviva's decision to exclude the patio from the claim is unreasonable based on the evidence.

The complaint was passed to me and on 28 January 2022 I set out my provisional findings. I've included an extract below:

"This has evidently been a difficult matter for the parties to resolve and has been complicated by Aviva's unsuccessful attempts to remove the third-party tree.

Based on the evidence I've seen, both Mr W and Aviva agree that removing the tree would be the preferred choice. And since the complaint has been referred to our service it appears Aviva has attempted to further engage with the third-party to remove the tree. But as things stand this doesn't appear to be an option. And in any event, I can see Mr W was told in April 2020 that Aviva had accepted the tree would remain, so it can be said that he has reasonably acted with this in mind since.

So, I wish to make it clear that my decision assumes that the tree will remain, in order to arrive at a relevant and fair answer here. And therefore, the points left for me to consider are:

- *Mr W's concerns about the 2011 claim.*
- *Whether Aviva's decision to propose a root barrier is fair and reasonable in the circumstances.*
- *Aviva's scope of repairs and limit of liability under Mr W's policy (including the patio).*
- *Mr W's request to be reimbursed for J's reports.*
- *If any compensation is due for distress and inconvenience caused to Mr W.*

Link between claims

Mr W strongly feels Aviva's initial decision on the 2011 claim was incorrect, so I've considered the report from the loss adjuster at the time as well as the more recent expert reports for context.

The recent reports are silent on this point. But the 2011 report states, "it is my opinion that the damage to the left-hand side of the main building is the result of the residual bedding down/settlement of the building's structure following the roof extension works." It goes on to state, "Should new cracks in excess of 0.75mm appear...some further investigations may be required to confirm the cause of further movement."

Mr W confirmed that the repairs were done, and no further cracks or movement were identified until 2017. So, there wasn't anything to put Aviva on notice that it may have misdiagnosed the cause of damage. And even if the cause of the damage was linked, based on the limited evidence from the time I can't say Aviva's initial decision was unreasonable. Any investigations would have most likely been proportionate to the level of damage, which appeared to be relatively minor and didn't deteriorate. So, I don't intend to conclude that Aviva has acted unfairly regarding its conclusion about the 2011 claim.

Proposed method of repair

Having reviewed everything, I don't think a further independent report is required and I intend to make my decision on what's already been provided.

Several expert reports have been provided for me to consider about the proposed method of repair. And for ease of reference I'll set out the one's I intend to refer to below:

- *An arboriculturist's report (P) around October 2019, commissioned by Aviva.*
- *Three loss adjuster reports from around January 2020, March 2020, and January 2021, incorporating further site investigations, level monitoring results, and commentary from their appointed structural engineer (S), commissioned by Aviva.*
- *Two structural engineer reports (J) around April 2020 and March 2021, commissioned by Mr W.*
- *A third-party structural engineer report (A) around October 2019, commissioned by the third party who own the tree.*

Where the information I've got is contradictory, as some of it is here, I must base my intended decision on the balance of probabilities.

Our service's general approach is that Aviva is required to provide a remedy which leads to an effective and lasting repair of the damage. In this case assuming the tree remains.

Aviva's position is that S' report shows the property can be repaired following the installation of a root barrier. And that the root barrier will allow water run-off to rehydrate and stabilise the soil under Mr W's property quicker. So, it says it isn't necessary to consider more expensive options such as underpinning. Therefore, it considers the root barrier and superstructure repairs as the most reasonable option to settle the claim.

But having read all the reports, as I understand it, P's report (which was commissioned by Aviva to specifically assess the heave risk to the third-party property if the tree was removed) states, "the site layout precludes a root barrier and engineering advice is that the internal walls of [Mr W's property] will need underpinning in any event".

The engineering advice P refers to is found within A's report and overall lends weight to a root barrier not being an effective and lasting solution.

J's report also casts doubt on the effectiveness of a root barrier stating, "I am concerned however, that root barriers generally only have a limited life with roots being known to grow around them". And in J's next report it states, "I can confirm that regular pollarding of the...tree, or a root barrier, cannot be considered as permanent solutions to stabilise either [Mr W's property] or to prevent potential future issues at [third party property]".

I think this shows that there are different concerns with the root barrier, in terms of its effectiveness and location. And having carefully considered all the reports I am persuaded that it is more likely than not a root barrier wouldn't lead to an effective and lasting repair here.

This is further supported by both A and J's reports recommending that underpinning would be required to Mr W's property if the tree remains. In fact, J states, "There are only two possible options namely, the...tree removal, or alternatively the extensive underpinning of [Mr W's property]".

Multiple reports comment on the issues of partial underpinning and the risk of subsequent differential movement from the tree including S, A and J. Therefore, for that reason I am persuaded that partial underpinning would not lead to an effective and lasting repair of the damage based on the risks identified.

In conclusion, I am persuaded that it has been shown that the extensive underpinning proposed by J is the only viable solution for an effective and lasting repair to take place in the presence of the tree. So, I intend to require Aviva to settle the claim in line with the recommendations of J's report.

Patio liability

Aviva has turned down repairs to the patio foundations as it is relying on a policy exclusion for defective or faulty workmanship. It says the reason for this is because Mr W's contractor should've taken the proximity of the tree in the third-party property into account when designing the patio foundations.

So, the test here is for Aviva to show this exclusion fairly applies.

Aviva has attempted to visit the property in line with our investigator's recommendation to measure the patio foundations. Mr W has said he doesn't wish for this inspection to take place.

Having considered everything, I don't think this inspection is required to show whether the foundations were 'defective' or not in any event. I'll explain why below.

As our investigator has concluded, in order to fairly decline this part of the claim, Aviva would need to show that the relevant standards weren't met and that the failure to meet those standards is the reason for the damage to the patio.

Aviva has relied on guidelines attributed to an organisation which supports the building standards of new homes, who I'll refer to as N, and as such say that the predicted depth of the foundations (c.1 metre) are too shallow. Aviva says that all builders should reference N's guidelines as part of good industry practice.

I understand the point Aviva is making here, but I've seen no firm evidence to show this is the case. And given that building regulations don't apply to patio constructions, this would mean Mr W and his builder would be held to a higher standard of construction than they were required to meet. I say this because whilst a builder could consider N's guidelines when planning the foundation depth of a patio, it only needs to consider any relevant regulations that apply.

Further, when the patio was built Mr W wasn't aware there was a risk of subsidence damage to its foundations. His previous claim had been linked to settlement and so he wouldn't have been able to reasonably foresee that the tree was a potential problem. And as far as I can see neither property had a history of subsidence so he wouldn't have been able to furnish the builder with this information.

In any event, had the patio's foundations been slightly deeper to take into account the nearby tree, then I think it would have most likely subsided anyway due to the dominant cause of clay shrinkage happening in the underlying, deeper soil.

So in the circumstances of this claim, I don't think Aviva has shown that this exclusion fairly applies, and I intend to require Aviva to include the repairs to the patio foundations as part of the wider scope of repairs to Mr W's property.

Reimbursement of expert reports

Our investigator recommended Aviva reimburse Mr W £510 for one of J's reports. But I can see that in total Mr W has claimed for two of J's reports totalling around £1,900.

I've considered both reports in my decision, and in my opinion both reports have provided evidence to support Mr W's claim. The April 2020 report raises concerns with the effectiveness of the root barrier, in conjunction with the potential for further movement to the newer extensions of the property. And the March 2021 report is considerably detailed and provides substantial evidence (following a site visit) about the damage to the property and the need for a permanent solution.

So it follows that as J's reports have provided clear evidence to a permanent solution to stabilising Mr W's property in the presence of the tree, I intend to require Aviva to reimburse Mr W for the cost of these reports subject to proof (such as an invoice) being provided as evidence of the cost to Mr W.

Compensation

I've considered that subsidence claims can be complex and will often incur delays whilst the parties determine the best way to proceed with the claim. On this occasion I acknowledge that not all the delays were caused by Aviva. But I do need to consider if compensation is due for any avoidable delays it was responsible for.

Aviva has provided evidence that it has made several attempts to contact the third-party solicitors to remove the tree, and to conduct further investigations as to the impact of the tree removal. I can see that it didn't always keep Mr W in the loop, and I can imagine this would've added to his frustration as the claim didn't appear to be moving forward. So, I think Aviva did cause some upset to Mr W here.

I don't think Aviva can be held responsible for delays up to April 2020, as it was still actively engaged in pursuing the tree removal. But when it drew up the proposal for the root barrier it seems to have accepted the tree would remain. So, I think there has been some avoidable delays caused between April 2020, and the time the complaint was referred to our service in February 2021. I say this because Mr W has been held to a position on the claim where he felt he had no other option but to get an independent engineer's report. And this had added additional time to the claim overall. And I acknowledge that whilst Aviva did offer an Independent Engineers opinion in July 2021, this was some months after the complaint had been referred to our service, and after Mr W had already commissioned two expert reports for a proposed solution. So this would've been of much greater and practical benefit around April 2020 when the proposed scope of repairs was disputed by Mr W.

Additionally, I'm not persuaded that Aviva has considered the worsening condition of Mr W's property when it reviewed its position on the claim at the final response stage. Aviva proposed the root barrier as a solution and its approach is to wait until the property stabilises before commencing repairs. But J's report (which Mr W provided to Aviva) states, "It is evident that the property is suffering from significant structural damage" whereas Aviva's earlier reports indicated the cracking and damage was less severe. So, I think it can be shown that the delays since April 2020 have contributed to worsen the damage for which Aviva has already accepted there is a valid claim.

Taking all the above into account, I find that an award of £700 would better reflect the distress and inconvenience caused to Mr W that I've set out above.

In summary, I proposed that to put things right, Aviva should:

- Settle the claim by arranging to underpin the entire of Mr W's property in line with the recommendations in J's report.
- Include the repairs to the patio foundations into the overall scope of repairs.
- Reimburse Mr W for the costs of J's reports, subject to proof of evidence, such as an invoice.
- Pay 8% simple interest on the amounts Mr W paid for the reports, from the date they were paid for to the date of settlement*.
- Pay Mr W £700 compensation for the distress and inconvenience caused.

Responses to my provisional decision

Mr W accepted most of my provisional findings. But he felt the amount of compensation I proposed was too low. He provided a further submission which I've carefully considered below.

In summary, Mr W said:

- That the evidence relied on in my decision had been available since October 2019, and since then Aviva has been fighting to get him to agree to the cheaper repair option of a root barrier. And he said that Aviva had constantly been playing down the damage to his property to support its proposed repairs.
- That Aviva deprived him of the funds he spent to obtain the expert reports for two years when it was aware of his specific personal circumstances, and this increased the overall burden on him at the time.
- That Aviva had added to the distress and inconvenience by not upholding any part of his complaint.

- Based on his experiences with the third party, he doesn't believe Aviva has credibly pursued the removal of the tree with them as he says the evidence shows it would then mean that both properties would most likely require underpinning.
- That at the time of the claim he was going through a difficult situation in his personal life, which Aviva were aware of, and used this to try and get him to accept a cheaper repair so he could move on.
- There had been additional stress caused by watching the property deteriorate over the last two years, which could've been avoided had Aviva decided on a reasonable repair sooner.
- That Aviva's decision to exclude the patio from the policy liability late in the claim caused additional upset.
- That he hasn't been fairly compensated for the time taken to deal with both the claim, and in bringing the complaint to our service.

Aviva provided further commentary from its loss adjuster which was annotated to my provisional decision. In summary, it said:

- The proposed root barrier was a proportionate repair to the level of damage in Mr W's property, as the level monitoring shows only minor movements in the majority of places.
- The "severe" damage in J's report was locally to the hall walls and movement of the floor.
- That it had instructed additional internal site investigations and enhanced level monitoring to determine if part of the property extension was being influenced by the tree. But in its opinion, it didn't think it was.
- That I had drawn the wrong conclusion on S' report; it said the root barrier would be of the greatest benefit, and not that it wasn't necessary to consider underpinning.
- The extent of the underpinning scheme proposed by J had not yet been produced. And in any event, it didn't think full underpinning was appropriate as the damage was concentrated in the rear left-hand side of the property. It questioned to what extent my recommendation for underpinning the property covered.
- It asked if it would be held to a higher standard of repairs for the patio or whether it could rely on the existing foundations as building regulations didn't apply. And it suggested that a competent builder or designer would've factored in the tree and soil composition to their plan.
 - It didn't agree that it was most likely the patio would've subsided in any event because no investigation of the foundation had taken place. So it maintained it could still be due to shallow foundations.

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.

Mr W's response

I've considered Mr W's comments carefully about why he feels further compensation is due. And whilst his response goes into some detail, I haven't seen anything which wasn't available to me (albeit in more general terms) when I decided the award in my provisional decision.

In addition, some of the events Mr W refers to (such as maintaining the patio) happened before the point which I had determined Aviva was responsible for any avoidable delays – around April 2020. And whilst I acknowledge that this claim happened at a difficult time for him personally, I can only award for avoidable delays, and distress or inconvenience which are as a direct result of Aviva's actions. In other words, had the claim been handled as expected throughout, it appears that there were still events which would've caused Mr W some distress and upset here.

I'll also acknowledge that whilst it is clear Mr W has spent considerable time preparing his submission to our service, we don't generally award compensation for the time spent in dealing with, or handling of a complaint. And we don't pay compensation for a business' decision to not uphold a complaint.

The fees reimbursed for Mr W's expert reports include an interest payment which covers the time he was without the funds. I am satisfied that this is a fair and reasonable remedy in line with our general approach. So, I won't require Aviva to pay additional compensation for this.

I do not intend to make light of Mr W's situation over the last few years, and I was sorry to read of how the events overall have taken a toll on him and his family. But having reconsidered my decision, I am satisfied that the award proposed fairly reflects the impact of the delays directly attributed to Aviva. And this includes the deterioration to Mr W's property which I set out in my provisional decision.

Aviva's response

Aviva hasn't provided any comment about my proposal to reimburse Mr W's reports, or on my compensation award. So, having reconsidered these two points, I've come to the same conclusions I reached in my provisional decision, and for the same reasons.

Whilst Aviva's loss adjuster has raised concerns over parts of my provisional decision, it hasn't provided me with any new evidence which wasn't available to me when I set out my provisional findings. So, for me to change my mind I would need to be persuaded that I initially reached an outcome that was unfair and unreasonable on the same evidence.

I can see there remains some dispute from both parties about the extent of the efforts made to remove the third-party tree. But I don't think it's relevant for me to go into this any further. As I set out in my provisional findings, the crux of the issue is that the tree remains, and therefore an effective and lasting repair is required to Mr W's property for the damage caused by subsidence.

Aviva's comments indicate that I've not placed the right emphasis on S' report by saying that it concluded that underpinning the property wasn't necessary. And that the root barrier wasn't the most reasonable option but the most *proportionate* to the damage caused. Having reconsidered this, I can see that S' comments state "*we recommend option 1 [the root barrier] would be of greatest benefit. The benefits of this option are: a. No partial underpinning scheme is undertaken to the property which could give rise to further possible differential movements to the underpinned and on underpinned areas...*"

I agree with the loss adjusters' comments about what S' report concludes. And I want to reassure Aviva that this was factored into my original decision. My comments on this point were to infer that as S proposed the root barrier, then simply put it didn't think underpinning the property was needed, otherwise it would've recommended that instead.

Having considered the points the loss adjuster raised, and reconsidered the expert reports provided, I've not seen anything further that persuades me that the conclusions I reached were either unfair or unreasonable. So I refer to my provisional decision where I concluded "*that it has been shown that the extensive underpinning proposed by J is the only viable solution for an effective and lasting repair to take place in the presence of the tree.*"

I acknowledge Aviva's comments that the extent of the underpinning scheme has not yet been produced, and that it doesn't think full underpinning is appropriate. But as set out in my provisional decision, the reports I've considered highlight the risks of differential movement should the property be partially underpinned. So, my direction of underpinning the entire of Mr W's property was aimed at ensuring the proposed schedule of repairs was effective and lasting, in line with our service's principles of fairly and reasonable settling the claim.

Having reconsidered my direction, I accept that J's report suggests the property will need "extensive underpinning", and this may not necessarily mean the *entire* property is covered in the scheme. But this will be for the expert engineers to decide what is required in order to complete an effective and lasting repair to Mr W's property. Should there be a dispute about the scope of the underpinning scheme moving forward, then this will be a matter that falls outside my decision.

Ultimately, my role here isn't to decide the scope of underpinning required. I have weighed up everything that's been provided by the experts and decided what I find most persuasive. So, it follows that my direction is that the claim be settled by arranging to underpin Mr W's property in line with the recommendations in J's report.

With regard to the patio and its foundations, the same reasoning for an effective and lasting repair applies. If Aviva can ensure this is the case using the same foundations, then it can do so. But in line with our service's approach, it is possible that Aviva will need to undertake repairs for uninsured work to ensure it is lasting. And from what I've seen it's more likely than not that this would include additional work to the patio foundations, given that the tree remains.

I therefore direct Aviva to put things right as set out below.

Putting things right

- Settle the claim by arranging to underpin Mr W's property in line with the recommendations in J's report.
- Include the repairs to the patio and its foundations into the overall scope of repairs.
- Reimburse Mr W for the costs of J's reports, subject to proof of evidence, such as an invoice.
- Pay 8% simple interest on the amounts Mr W paid for the reports, from the date they were paid for to the date of settlement*.
- Pay Mr W £700 compensation for the distress and inconvenience caused.

*If Aviva considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr W how much it's taken off. It should also give Mr W a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

My final decision is that this complaint is upheld. I require Aviva Insurance to put things right for Mr W by doing what I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 29 March 2022.

Dan Prevett
Ombudsman