

The complaint

Mr G complains that Aviva Insurance Limited has unfairly declined a claim for damage to his property under his commercial property insurance policy.

For ease, any reference to Mr G and Aviva includes things said and done by their respective agents.

What happened

The history of this claim and the events pertinent to it are well known to both parties, so I've summarised what's happened.

The property

Mr G is a landlord and has a commercial property insurance policy for a property he owns. The property sits at the end of a terrace of houses and is located near a valley. Following Storm Doris in February 2017, a landslip occurred at the rear of Mr G's property. It caused damage to a sewer to which the property's (and those in the terrace) drains were connected.

In August 2017, the local council issued an Emergency Prohibition Order (EPO) for Mr G's property. The EPO said that following the council's monitoring and investigations relating to the landslip, hazards existed which posed an imminent risk to the health and safety of occupiers and visitors, and so immediate emergency action had to be taken and the property vacated.

Several property owners from the terrace appealed the EPO order, but it was dismissed by the Residential Property Tribunal because the works required to remove the hazards – as outlined in the EPO - hadn't been undertaken. The Council subsequently served a Demolition Order for all the properties in the terrace in March 2020. As of January 2022, the property had not been demolished but the demolition order remains in force.

- 2016 policy

In 2016, when the policy renewed, cover was provided on an "all-risk" basis with an additional contingency for subsidence and landslip included. Following the landslip - and the property being untenanted - a mid-term amendment was made in December 2017. Cover was restricted to damage caused by fire, lightning, earthquake, and aircraft (FLEA).

- Storm damage

In September 2019, Mr G notified Aviva that he wanted to make a claim. He said the damage to his property was caused by Storm Doris in 2017. Mr G provided a surveyor's report to support his position. Aviva considered the claim under the 2016 policy – which provided "all risk" cover. It inspected the property in October 2019 but couldn't identify damage caused by a storm.

- *Subsidence / landslip*

The claim was reconsidered to determine if the damage had occurred because of landslip or subsidence. But when Aviva inspected the property in October 2019 and January 2020 it said there wasn't damage attributable to either. A crack was determined to have been *"most likely caused by normal thermal expansion of the property"*.

In April 2020, Aviva declined the claim having not identified damage to the property caused by storm, subsidence, or landslip.

In August 2020, Mr G challenged Aviva's decision on the basis that Aviva hadn't been able to fully inspect his property. He said Aviva's findings were, therefore, incomplete. Mr G provided his own surveyor's report, which he said evidenced the damage was covered under the 2016 policy. Mr G contended:

- the landslip caused cracking to the rear of his house, and displacement and cracking to the foul and surface water drain which runs under the rear garden.
- the 2016 policy includes accidental loss - which he says he experienced due to not being able to use his property because of the EPO.

In September 2020, Aviva returned to Mr G's property to complete a further inspection. It again concluded the damage was not attributable to subsidence. The report said:

"We have found no evidence to suggest subsidence (downward) movement affecting the main dwelling. We...consider the movement of the slab away from the rear elevation main wall, where the open canopy structure abuts the main wall, is considered as normal settlement and to some degree is to be expected and not unusual, given it would not have the same foundation detail as the foundations for the original building and main load bearing walls."

"...we have found no crack damage consistent with subsidence resulting from the landslip and the crack damage inspected on all internal and external aspects, both from our initial and subsequent survey on 30th September 2020 do not appear to implicate subsidence as operative."

With regards to the drain survey report – carried out by a third party in July 2020 - Aviva said:

"the displacement and cracking damage to the drains has not been caused by subsidence or landslip. Instead, the defects are consistent with the normal settlement which would be expected in terrain of this nature and exposure of the drains to damage caused over a period of time by invasive roots from the overgrown vegetation in the rear garden of the Property."

So, in summary, Aviva said the damage to the building and drains wasn't covered because damage caused by gradual deterioration, wear and tear, normal settlement of new structures, or the building's / structure's own cracking or collapse is specifically excluded under the policy.

Aviva said being deprived of using the property does not itself constitute "damage". It said the policy requires damage to be *"physical loss, destruction or damage"* and so Mr B does not have cover under accidental loss.

- *2020 policy*

In 2020 when the policy renewed, “reinstatement” was removed from the “basis of claim settlement” section and replaced by “debris removal costs only.”

Aviva said that because the cover was for FLEA only, there was no cover for any loss arising from the obligation to demolish the house at the property in compliance with the Council’s demolition order. It added that even if cover wasn’t restricted to FLEA, exception 1b provides that *“no indemnity is payable in respect of any loss which is the direct or indirect result of destruction by or by order of any....Local or public authority.”*

Mr G complains that Aviva hasn’t taken a consistent approach in deciding claims regarding the 2017 landslip. He said he’s aware that neighbours in the terrace - who are also insured by Aviva, and whose properties were affected – have had their claims upheld.

Mr G brought his complaint to our service. In addition to the above, Mr G said Aviva hasn’t treated him fairly because it failed to provide reports it relied on and only gave him extracts of these *after* he complained. He thinks it’s unfair that Aviva said in a report that subsidence was the apparent cause of the damage and that it shouldn’t be allowed to go back on its word, even if it was said in error. And he wants this service to review how Aviva has handled neighbours’ claims.

Our investigator considered the complaint but didn’t uphold it and so the complaint has been passed to me for a decision.

I set out my thoughts in a provisional decision, in which 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 intend to reach a different outcome to our investigator, and I’ll explain why.

In 2016, Mr G’s policy included an additional contingency for subsidence and landslip. Put simply, because this was an “all risks” policy (up until December 2017 when it changed to cover on a FLEA basis) which included cover for subsidence and landslip, it covered any damage to the property, subject to the policy terms and exclusions.

Mr G has shown there’s damage to his property. For Aviva to fairly decline the claim, it must show that all the damage is either excluded from the policy, happened prior to the policy being taken out or before the policy changed to FLEA only.

Mr G considers there to be overwhelming evidence – most notably the existence of an EPO - to support his position that landslides in 2017 diminished the structural stability of his property. Aviva has declined Mr G’s claim on the basis it hasn’t been able to identify physical damage to Mr G’s property which can be attributed to storm, subsidence or landslip.

But the relevant question here, is not whether the damage was caused by storm, subsidence, or landslip, it’s whether Aviva has shown the damage was caused by something excluded under the policy. So, I’ve considered this in respect of the building and drains.

The building

Both parties agree there is crack damage to the property. Aviva identified crack

damage in the rear, first floor, bedroom and to the drainage pipes.

Mr G's surveyors identified this damage, as well as:

- Crack damage at the junction where the external concrete slab meets the rear wall*
- External crack damage between the upper and middle windows on the rear elevation*
- Internal crack damage visible to rear wall / adjacent ceiling in upper flat*
- Crack damage over floor into the ground floor rear door*

Aviva says the damage is excluded because it's "caused by [the property's] own cracking or collapse". It says even if the damage was caused by subsidence – which it says it wasn't – the additional contingency excludes damage caused by the "normal settlement, shrinking and cracking of any building".

In other words, Aviva needs to show the building cracked without something having acted upon it during the relevant period. It is difficult for me to be persuaded that this was the case when I've seen two expert reports which show a landslide occurred during the period in the vicinity of the property.

For example, Mr G's surveyor said:

On the balance of probabilities I consider that a significant amount of the cracking and displacements to structural elements that I saw and recorded on 7 July 2020 at [Mr G's property] are indicative of ground movement at or below foundation level and accordingly it is reasonable to attribute these to the landslip event that occurred in 2017"

On the other hand, Aviva's reports focus on whether the damage was caused by subsidence, which it's said it wasn't. While I can accept the damage wasn't caused by subsidence, that's not actually relevant here. What's key is whether Aviva has shown that the damage occurred as a result of the building's own cracking or collapse but from what I've seen, I'm not persuaded it has. I say this because its reports focus on whether subsidence was the operating cause as opposed to detailing how the damage occurred if it wasn't as a result of something happening to the building.

Aviva said "we consider that both the crack damage and distortions are historic. It is likely that movement has now stabilised." It has provided pictures which show the windowsills and kitchen unit as level, but this was to evidence that subsidence wasn't the cause. I'm not satisfied this alone shows the cracks occurred because of the buildings "own cracking or collapse." There's also no explanation as to why the damage was considered to be pre-existing.

Similar to this, the January 2020 report identifies a crack in the first-floor rear bedroom which simply says, "vertical crack, not subs". But again, there's no explanation as to why this is evidence of the "building's own cracking" or "normal settlement, shrinking and cracking".

If Mr G couldn't point to an event – whatever that might be - then it might be reasonable to conclude the cracking was due to the building's own cracking or collapse, but that's not the case here – there was a landslide in the vicinity of Mr G's property. Aviva, therefore, needs to persuade me that despite the landslide, the landslide had no impact on the house, or the damage was pre-existing. And when I balance Mr G's expert reports

with the findings of Aviva, I think it's more likely the damage occurred because of something happening to Mr G's house, as opposed it being due to the building's own degradation. And it's for these reasons, I don't think Aviva has demonstrated that the exclusions it's seeking to rely on apply.

Malicious damage

Aviva's expert report includes pictures of internal damage to Mr G's property. It says it considers this to be malicious damage or vandalism and that it was caused by previous tenants.

I can't see that Aviva has said this damage is excluded. In the absence of this, it would be responsible for covering this damage – provided it occurred before the property changed to a FLEA policy.

Underground pipes

Under the policy the definition of a "building" includes "underground pipes". Mr G argues the landslide caused damage to the property's underground services and is therefore, covered under the policy. Aviva appear to accept Mr G is the owner of these pipes as they lie within the land immediately surrounding his property.

Both parties agree the pipes are damaged, but what's in dispute is how the damage came to be. Mr G has shown there's damage – and that's all he needs to do. It's for Aviva to demonstrate exclusions apply. Aviva has said the damage to the drains is excluded because it's:

- *caused by [the property's] own cracking or collapse*
- *consistent with normal settlement which would be expected in terrain of this nature*
- *caused by "gradual deterioration" due to overgrown vegetation.*

So, I need to decide whether it's shown the exclusion likely applies. I've looked at the drains survey which was carried out in July 2020. The report says the structural defects and service / operational condition of the drains is a "grade 5" meaning:

"the pipe is at risk of collapse at any time. Urgent consideration should be given to repairs to avoid total failure" and "the pipe is at high risk of backing up or causing flooding."

It's apparent there are numerous displaced joints and that the pipe is collapsed or broken in various places.

I note Aviva has said "the drains do exhibit damage, [but] we cannot say with any certainty whether the drainage was damaged either before, during or since the event." Aviva's opinion is that if the drains had been surveyed shortly before the landslip, they would have been found to have defects as is often the case with pipes. It has also relied on the gradual deterioration exclusion – stating that overgrown vegetation at the rear of the property caused damage to the pipes and so the damage isn't covered.

Whilst I accept the drain report shows roots were present, I'm not persuaded Aviva has substantiated its position on this. I say this for a few reasons. First, roots aren't ordinarily able to penetrate sealed pipes – it would be unusual for roots to break into the pipe without there being an access point. Second, given the report shows the pipe as

having collapsed or broken in a number of places, it's plausible the roots instead exposed gaps in the pipes, as opposed to creating them. Third, as the drain report took place three years after the landslip occurred, there would have been sufficient time for roots to have gained access to the pipe (via broken parts) and grow in and around it.

In light of this - and because I haven't been provided with evidence from Aviva to persuade me how the damage occurred before the landslip or after the policy changed to FLEA - I don't think it's reasonable for it to decline cover on the basis of the damage having been caused as a result of gradual deterioration caused by overgrown vegetation.

Accidental loss argument in respect of EPO and DO

Mr G argues that as the 2016 policy included cover for accidental loss, his inability to physically use his property because of the EPO, is akin to a loss. I sympathise with Mr G that he wasn't able to use or lease his property following the order, but what's key here is that the policy excludes cover for damage or loss which occurs by order of any government or any local or public authority.

I've looked at the policy wording applicable to when both claims were made, and in each policy, it states:

"we will not indemnify you in respect of [...] damage or destruction by or by order of any government or any local or public authority."

As the local authority served the EPO – and subsequent demolition order – whether Mr G's "loss of use" can be considered "accidental" or "physical damage" (as required by the policy definition) becomes irrelevant. As ultimately, cover is excluded where the order was made by the local authority.

Claims handling

Given Mr G's neighbours' properties have been subject to similar events, I understand why he has an interest in how those claims (where Aviva was the insurer) were settled. But, as our investigator explained, each claim is looked at on an individual basis. There are likely to be things that differentiate Mr G's policy and circumstances from that of his neighbours – and so, it wouldn't be reasonable to decide his claim based on how other claims were handled.

Our investigator explained that Aviva isn't required to share its surveyor reports with its customers. However, it is best practice to share survey findings relevant to the customer. So, whilst we may not expect Aviva to share any internally focused reports, the findings about the damage itself would usually be routinely shared. I note Aviva did share extracts with Mr G but only after he complained, which is disappointing. Ultimately, however, I don't think Mr G has been prejudiced by not having received the reports in their entirety.

Mr G has said that because Aviva made a typographical error in an email to him – in which it said subsidence was the cause of the damage – his claim should be covered. I've read the relevant document and can see the word "does" was typed rather than "does not". It's unfortunate the error was made in respect of a word upon which the claim hinged, but when read in the context of the paragraph, document and report from which it was extracted – it's apparent this was a mistake, and not what Aviva intended to say. So, I'm not persuaded by Mr G's argument that Aviva should cover the claim because of this mistake.

Putting things right

Mr G says his claim was unfairly declined. Mr G has shown damage occurred but from what I've seen, I'm not satisfied Aviva has demonstrated the exclusions it seeks to rely on apply. And so, I think it should accept the claim.

My provisional decision

My provisional decision is that I uphold this complaint and require Aviva Insurance Limited to accept the claim."

Mr G didn't reply to my provisional decision, but Aviva provided additional information – some of which was new - for my consideration. This new information was shared with Mr G along with my revised thoughts, where I said:

"In my provisional decision I said Aviva hadn't sufficiently substantiated the exclusions it is seeking rely on, but it's since provided evidence which does persuade me that parts of the claim shouldn't be upheld. I'll address each in turn.

1. Movement of concrete slab to the rear of the property

Aviva has said there is no cover in respect of the concrete slab to the rear of the property because even if it was covered by the additional contingency (i.e. if subsidence or landslip was found to be the operating cause), the slab (patio/terrace) would be excluded as it wasn't specifically stated in the Schedule (which the additional contingency condition requires) and there also needed to be subsidence or landslip damage to the main building – which it says there wasn't. I've accepted the latter (having read Aviva's latest expert findings) under point 2 below. So I'm more persuaded the slab has either moved because it has undergone normal settlement under its own weight or because of defective design or inadequate construction of its foundations. It follows therefore, that I won't be recommending Aviva accept this part of the claim.

2. Cracking to the building

In my provisional decision, I said although Aviva had focussed on why it considered subsidence not to be the operative cause, it hadn't suitably demonstrated which policy exclusion(s) applied and why. In response to this, Aviva said – "Sedgwick's report focusses upon identifying whether the cracks have been caused by subsidence because that is how the claim was presented by the Insured". It went on provide further commentary from the expert who inspected the property and produced Sedgwick's report. It's this commentary which I find persuasive, and in the interest of natural justice, I've attached it for Mr G to review. Of note is the expert's findings regarding the shape and pattern of the cracks – how these can more reasonably be attributed to general age and deterioration as they don't tally with how subsidence cracks ordinarily appears, nor are they mirrored internally and externally (as would be expected with subsidence), and that cracks around doors and windows are likely due to a lintel failure - this being a common point of weakness. This coupled with the buildings age, general poor condition and the distance from Mr G's property to the landslip site, persuades me that it's reasonable for Aviva to decline this part of the claim based on the damage being by it's own cracking or settlement.

3. Drains

In my provisional decision, I said I wasn't persuaded by Aviva's argument that the damage to drains wasn't caused by the landslide. In response Aviva has accepted that it can't show when the damage occurred. But it has suggested that in the absence of a complaint being made by the tenants that the drains were not performing adequately, it's reasonable to say the damage to the drains occurred after the property had been vacated because of the EPO. I don't consider this to be a persuasive argument. The drains are underground and so it wouldn't necessarily be apparent to the tenants (if tenants were in situ) that there was an issue.

In any event, the nature of the cracking and joint displacement appears to be more likely caused by something having been "done to" the pipes, rather than being caused by overgrown vegetation as suggested by Aviva. I explained in my provisional decision why I considered that to be unlikely so I won't reiterate it here. Furthermore, even if the drains had remained functional – that in itself, doesn't mean there isn't damage which needs to be repaired. My position remains unchanged that I think Aviva should accept this part of the claim.

4. Accidental Loss argument in respect of EPO and DO

When setting out my provisional thoughts, I explained I didn't think Mr G had a valid argument in respect of loss of rent / loss of use of his property because the policy excluded damage or loss which occurs by order of any government or local or public authority – as is the case here. Aviva agreed. My position remains unchanged in respect of this.

5. Malicious damage

In my provisional decision I said that as Aviva hadn't identified an exclusion in respect of the malicious damage, it ought to be covered. Aviva has said it didn't address this aspect because it didn't "understand that any claim was being advanced in respect of this damage." Aviva goes on to cite Policy Condition (4) "Claims Procedure" which provides that "if in relation to any claim you have failed to fulfil any of the following conditions, you will lose your right to indemnity or payment for that claim".

In summary the condition requires the policy holder to notify the police of the malicious damage, provide a written claim containing details of the damage and the amount of the claim within seven days of the damage. Aviva has said it wasn't notified of a claim for malicious damage and so the policy condition hasn't been met. I haven't been provided with evidence which shows such a claim was made and in time. In the absence of this evidence, it wouldn't be fair to ask Aviva to cover this element of the claim – and so I don't intend to uphold this part.

6. Claims handling

In my provisional decision I acknowledged that although Aviva's handling of the claim could have been better at times (i.e. it could have shared the survey findings with Mr G earlier on), I wasn't persuaded Mr G had been prejudiced. Aviva didn't provide a response to this. My position remains unchanged.

So my current position is that Aviva only needs to accept the claim in respect of the damaged pipes. Because I'm now intending to depart – in part – from my initial findings, the above will also be shared with Aviva. I'd appreciate both parties' comments by 11 May 2022. After which time, I'll issue my final decision.

In response Mr G provided further expert testimony which explained why the damage to the property was most likely attributable to landslip. Having considered this, I revised my position and sent both parties my thoughts. I said:

"I issued my provisional decision on 9 March 2022. I considered Aviva's response to it – following which I revised my position. This was shared with Aviva and Mr G on 4 May 2022. Mr G has provided a response to this setting out why he and his expert disagree with parts of the outcome I'd reached. Having considered this – along with the information provided by Aviva - I am minded to reach a different conclusion to that set out in my email of 4 May 2022. And I've set out my thoughts below.

Both parties will have until 22 June 2022 to provide any final comments. After which date I will issue my final decision.

1. Movement of the concrete slab

Aviva has said the concrete slab isn't covered under the policy because it wasn't specified in the policy schedule. I've looked at the policy document which says under the subsidence additional contingency section: "We will indemnify you in respect of damage at the premises caused by subsidence or ground heave of the site of the property insured, or landslip. We will only indemnify in respect of damage to (1) forecourts, car parks, driveways, roads, pavements, gangways, pedestrian malls, pedestrian access bridges, paths, patios, terraces, ornaments or statues [...] if (a) such property is specifically insured by this Section and damage also occurs to the building to which such property applies and that building is insured by this section."

I'm satisfied the concrete slab can reasonably be considered either as pavement, a path or patio given its proximity to the main building and so, falls within the policy definition. However, the policy goes on to say that in order for damage (which is caused by landslip) to be covered it must be specified in the policy schedule. I've looked at the policy schedule from 2016 – when the additional contingency was included – and I can't see that the concrete slab was specified. So, I'm not persuaded Mr G has a valid claim in respect of damage to the slab because the policy condition hasn't been met. So I don't need to go on to consider whether the damage to the building was caused by landslip in respect of this element of the claim.

2. Crack damage to the building

I've considered Mr G's expert's response. In it he reiterates that the damage to the building is caused by landslip. He says "I am firmly of the view that the pattern of the crack damage visible to structural elements at the rear [...] is consistent with the lateral displacement of underlying ground as it responds to the 2017 landslip events which occurred downslope of [Mr G's property]."

He goes on to say "As the ground moves it tries to "take" the rear wall with it and it is this outward displacement that accounts for the vertical cracking visible where internal partition walling / ceilings abut the rear wall at right angles."

Mr G's expert's findings (including those already provided) are thorough, detailed, and given the expert's extensive experience in his field of work, particularly persuasive. Whilst the property looks to be in a poor state due to both the passage of time and uninsured malicious damage, this doesn't mean there wasn't damage attributable to landslip. Having considered all the evidence, I'm more persuaded by

that provided by Mr G and so, am likely to say in my final decision that Aviva needs to pay the cost for putting right the damage to the building which is caused by landslip.

3. Drains

I don't intend to depart from my previous reasoning in respect of this. In summary, I'm not persuaded by Aviva's argument that overgrown vegetation is the cause of the damage to the underground pipes. In the absence of evidence to show how the damage occurred – which Aviva has said it can't provide - I'm more persuaded that it was attributable to landslip. So I'm likely to say in my final decision that Aviva should pay Mr G the cost to repair damage to the underground pipes which is attributable to landslip.

4. Accidental Loss argument

My position remains unchanged in respect of this.

5. Malicious damage

Aviva said Mr G didn't raise a claim for malicious damage and so it's not covered under the policy. Mr G hasn't provided evidence to show that he did, and so I'm satisfied there isn't cover in respect of this.

6. Claims handling

My decision remains unchanged in respect of this.

In light of the above, my final decision is likely to say that Aviva needs to pay Mr G for the cost of putting right the damage to the building (excluding the concrete slab) and underground pipes caused by landslip.

I'll consider any final submissions I receive by 22 June 2022, after which time I'll issue my final decision".

Both parties responded to my findings. Aviva reiterated the property's proximity to the landslip meant the damage was unlikely to have been caused by landslip. Mr G responded and said the property was not in a poor state at the time of the landslip and provided information regarding the property's renovation.

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.

Having considered the final submissions, my decision remains the same as that set out in my provisional findings of 15 June 2022. Whilst I note Aviva has said the location of the property is too remote for landslip to be considered the likely cause of the damage, I am more persuaded by Mr G's expert who said the evidence shows soil from the terrace – which was found to have moved downhill – also extended under Mr G's property. And so, I'm not persuaded his property was too remote for landslip to be considered the most likely cause of damage to his property.

For completeness, the claim should be accepted as follows:

- Crack damage to the property caused by landslip – Aviva should accept the claim in

respect of this.

- Concrete slab – the slab wasn't specified in the policy schedule meaning the policy condition hasn't been met. And so, Aviva isn't responsible for landslip damage caused to it.
- Underground pipes – Aviva should accept the claim in respect of damage which was caused by landslip.
- Malicious damage – Mr G did not submit a claim to Aviva in respect of this, so Aviva isn't responsible for putting right this damage.
- Claims handling – I'm not persuaded Aviva's handling of the claim has prejudiced Mr G's position, and so I won't be directing Aviva to pay him compensation.

The parties will need to work together to agree how to settle the claim. I won't be commenting on how that figure should be calculated as part of this complaint. If agreement can't be reached, Mr G is entitled to go through the complaint process again regarding the settlement figure.

My final decision

My final decision is that I partly uphold this complaint and direct Aviva Insurance Limited to accept the claim as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 21 July 2022.

Nicola Beakhust
Ombudsman