

The complaint

N – a company – has complained about Aviva Insurance Limited's handling and settlement of claim it made for subsidence damage to one of its properties.

What happened

I issued a provisional decision on this complaint in May 2022, explaining that I was intending to partially uphold it. Here's what I said in my provisional decision:

"What happened

There have been several businesses involved in this complaint who have acted on behalf of either N or Aviva. In my provisional decision below, any reference to N or Aviva includes actions or arguments taken or put forward by their respective agents/representatives.

N made a claim for cracking damage to one of its properties in 2013. Aviva appointed an engineer who confirmed the cause of damage to be tree induced clay shrinkage subsidence. The engineer recommended the removal of nearby vegetation followed by some structural and decorative repairs. The repairs were to be deferred until the following year, to allow the ground to rehydrate following removal of the vegetation. The structural works recommended included the fitting of helical reinforcement bars to the significant crack on the side elevation of the property. The repair work wasn't completed until mid-2015.

N appointed its own contractor to carry out some renovations to the property in 2015, with a view to letting the property to a housing association/charity. N's contractor said the quality of the work carried out by Aviva was poor. N complained to Aviva about this, but the dispute wasn't resolved. The prospective tenant decided not to rent the property.

In 2016, N instructed its contractor to carry out significant renovations, including repairing the alleged poor work previously carried out by Aviva. Following this, N listed the property for sale and secured a buyer. But in November 2016, the sale fell through when the homebuyer's survey identified several issues with the property, including potential ongoing subsidence.

N reported this to Aviva and, following additional investigations, the claim was accepted as a continuation of the 2013 claim. A contractor was appointed to carry out the works, but these were delayed due to damp at the property which Aviva said wasn't linked to the subsidence, but rather to the repairs N had carried out by its own contractor and/or rising damp.

In 2019, with the dispute over the damp still unresolved, squatters gained access to the property and caused further damage. Aviva declined to cover this damage because the property was vacant when the damage occurred, and malicious damage is specifically excluded in these circumstances.

N's complaint is that all of the damage and issues which occurred after the 2013 claim are as a result of Aviva's poor workmanship. It says no helical bars were ever fitted, and some of the vegetation which was supposed to be removed wasn't. Had the work been carried out properly, N contends that none of the subsequent damage would have happened. N is seeking to be fully reimbursed for the works its contractor carried out in 2016 and for Aviva to cover the cost of repairing the damp damage, squatter damage and to reimburse it for loss of rent between 2014 and 2019. Or alternatively, to compensate it for the lost sale in 2016.

Aviva hasn't disputed that the initial repairs weren't carried out in line with the recommendations of its engineer. But it disputes that its works were the cause of the subsequent damp issues, which delayed the final works. It says these issues have been caused by the work of N's contractor. Aviva also doesn't agree that it should cover loss of rent. This is because N didn't have a paying tenant in the property when the initial claim commenced and didn't put the property on the rental market after its contractor completed the renovations.

Based on the recommendations of its surveyor, Aviva made an offer of contribution to the costs incurred by N. This was to cover 50% of the costs which it agreed could be attributed to the subsidence related repairs and internal decoration. To this amount it said it would apply 8% interest from the point N was out of pocket to the date of its offer. And Aviva also offered to pay £2,000 compensation in recognition of the delays and issues it had caused during the claim.

One of our investigators considered N's complaint and thought it should be partially upheld. He said Aviva failed to follow the recommendations of its own engineer when carrying out repairs initially and this resulted in a repair which was neither lasting nor effective. He also felt the subsequent damp issues were most likely caused by the inadequate repairs carried out by Aviva. But our investigator felt that N hadn't appropriately quantified its losses and that it hadn't sufficiently mitigated its losses either.

So, our investigator concluded that a fair settlement for the damage would be for Aviva to pay 50% of the costs N incurred in redoing the subsidence cracking repairs and for it to calculate and pay 50% of the costs N would incur in addressing the subsequent damp damage. Our investigator agreed that Aviva didn't need to cover loss of rent (or loss of sale opportunity) and that it didn't need to cover the damage caused by the squatters either. Finally, our investigator agreed that Aviva hadn't handled N's claim well, but he concluded that the £2,000 compensation it had offered was enough to fairly compensate N for the impact of its errors.

N didn't agree with the outcome reached by our investigator and asked for an ombudsman to consider things. So, the complaint has been passed to me to decide.

What I've provisionally decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so I'm minded to reach a slightly different outcome to that reached by our investigator. From what I've seen, there are five issues which remain in dispute. For ease of reference, I'll address them separately.

Initial repairs

Aviva's appointed engineer confirmed N's property was affected by tree induced clay shrinkage subsidence in 2013. To remedy the issues, he suggested the following:

"We recommend the removal of the conifer screen to a length at least 6m beyond the rear left hand corner of the building.

We also recommend removal of two of the purple leaved trees located close to the left hand flank wall closest to (redacted).

...

Externally structural repair of the rendered elevation should be undertaken with helical reinforcing bars installed within the underlying external masonry wall before locally rerendering (sic)."

It doesn't appear to be in dispute that Aviva failed to remove all of the vegetation which ought to have been removed. Nor does it seem to dispute that the helical bars weren't fitted when the crack repairs were carried out in 2015 either. What remains in dispute is whether Aviva ought to reimburse N, in full, for the costs it incurred in redoing the works which Aviva completed in 2015.

Aviva says the scope of works for the initial repairs only included hacking out six linear meters of render from the side elevation. So, it doesn't agree that it should have to cover N's costs in stripping and re-rendering the entire side elevation. Instead Aviva has offered to contribute 50% of the costs incurred by N for the following works:

- Scaffolding used to repair side elevation*
- Hack-off side wall and render*
- Paint exterior of house*
- Plastering of entire house*
- Internal decoration throughout*

N says that due to Aviva's poor initial works, the side elevation required stripping back so that further cracks, caused by further subsidence movement and not previously repaired, could be appropriately repaired.

I've thought carefully about everything both sides have said and provided here. It's difficult to know for certain what works were actually completed initially given that Aviva has accepted no helical bars were fitted, despite them being required. But what is clear is that Aviva failed to deliver a lasting and effective repair when given the opportunity and that this led to further movement and damage. And that Aviva had a reasonable opportunity to review and inspect the issues before N went ahead and did the works, but it failed to fully engage.

So, based on the above, I'm intending to direct Aviva to cover 100% of the costs incurred by N for the scaffolding, rendering, external painting and interior plastering. This is because, on balance, I'm persuaded that it was reasonable for N to conclude that these works needed to be completely redone. To this amount, Aviva should add interest, in line with the offer it already made. But as I'm intending to increase the amount due to N here, Aviva should apply interest until the date of settlement, rather than to the date of its previous offer.

However, I note from correspondence between N and Aviva's engineer initially that the internal decorations at the property weren't intended to be covered from the outset, owing to their poor pre-existing condition and various outstanding maintenance issues. So, for this particular item, I consider that Aviva's offer of a 50% contribution is fair and reasonable, subject to the addition of interest. And as I'm not increasing the offer Aviva already made here, Aviva only needs to pay interest to the date of its original offer.

Damp issues

After N's potential sale fell through, Aviva accepted that the property was still suffering from subsidence and agreed to cover the claim as an extension of the initial claim. Following a period of unexplained delay, Aviva's appointed contractor halted the works. They reported the property was suffering from significant damp issues which needed to be addressed before repairs could be completed.

N contends that the damp issues have been caused by Aviva's poor repairs, either by moisture entering through the cracks or because of the proximity of the vegetation left in situ. Aviva contends that the damp was caused because of longstanding issues with the render and/or the repairs completed by N's own contractor. And it says the damp issue was exacerbated by the fact the property was left empty and unheated for a prolonged period.

Previously, Aviva's appointed surveyor had suggested the damp issues could potentially have been caused by rising damp. But this was later ruled out after dehumidifiers were used and the damp didn't reappear.

N has also argued that its contractor's work was only required because Aviva failed in its duty during the initial claim. So, even if it accepted its contractors works caused or contributed to the damp issues, N feels Aviva is ultimately responsible in any event.

Again, I've thought carefully about the submissions and evidence from both sides regarding this issue. Having done so, I'm minded to reach a different conclusion to our investigator. This is because I don't agree with N's assertion that it's reasonable for its contractor's responsibilities to deliver suitable repairs to be waived, purely because of Aviva's prior failure.

As stated in the above section, I agree that Aviva was required to deliver a lasting and effective repair and that it failed to do so. So, I agree it is responsible for covering the costs of the work required to correct its issues. But I think the chain of Aviva's responsibility for the quality of the required repairs is broken once N's own contractor carried out works.

From what I've seen, the potential homebuyer's report highlighted issues with the external render which it concluded were likely to have caused or contributed to the damp issues. It also highlighted an ineffective or breached damp proof course. As I understand it, from the contractor's own invoice and subsequent communications, it was N's contractor who carried out re-rendering, damp proofing works (through a sub-contractor), and internal plastering.

Aviva's surveyor agreed that some moisture would undoubtedly have got into the structure through the cracks present initially. But given the works N's contractor was carrying out, I think it was incumbent upon the contractor to ensure the structure was sufficiently dried out prior to completing the works which it did, and that it was watertight afterwards. And as it doesn't appear to have done so, I don't agree that it would be fair or reasonable to hold Aviva responsible for this.

N has also argued that the damp issues could have been caused by water entering the structure due to the proximity of the vegetation roots and further instance of subsidence movement. It says the surveyor's report completed by Aviva in late 2016 shows that there was significant structural damage as a result of the further subsidence movement.

Having reviewed this report, I don't agree that the damage it shows was significant, or likely to have caused the damp issues. I say this because the report specifically categorises the damage present at that time, based on categorisations widely used in the construction industry. The damage was categorised as "very slight" or between 0.1 to 1mm. So, I don't consider it likely that these cracks would have allowed sufficient moisture into the structure to cause the damp issues reported. Based on everything I've seen, I'm currently minded to conclude that Aviva doesn't need to contribute to the cost of repairing the damp issues.

Loss of rent/sale

N has provided evidence to show that it had a prospective tenant wishing to rent the property in 2015. It says the ongoing subsidence issues resulted in the tenant pulling out. So, N wants Aviva to cover its loss of rent. And it has argued that this should be covered from mid-2014 which is when the initial repairs were supposed to have been completed by.

Aviva says that at the point of the initial claim, N didn't have a paying tenant in the property, so it doesn't agree loss of rent should be due. Instead an employee of N's lived there rent free, in lieu of managing a nearby commercial building also owned by N. And this tenant vacated the property due to ill health, rather than because of the subsidence.

I agree that Aviva doesn't need to cover loss of rent from the point of the initial claim. However, I would potentially be inclined to award loss of rent from 2015, if I was persuaded that the reason N lost out on the prospective tenant was solely due to the subsidence issues.

I've thought about this. But from what I've seen, the condition of the property, prior to N's renovation works was poor, as shown by Aviva's refusal to cover internal decorations. And N's contractor's invoice shows that the property required significant works, such as a full rewire and new boiler alongside moving walls, replastering, and installing an en-suite. Taking this into account, on balance, I'm not persuaded that the subsidence damage was the only reason the property couldn't be let in 2015. So, I'm not intending to award loss of rent here.

Following completion of the renovations, N didn't list the property for rent, rather it put it up for sale and secured a buyer. The sale fell through when the homebuyer's survey identified ongoing movement, among other issues. N says that if Aviva doesn't cover loss of rent, it should cover N's losses as a result of the failed sale. It wants Aviva to pay either interest on the sale offer less the increase in value, which it says amounts to £15,000, or to reimburse N for a lost investment opportunity which it says it can evidence amounts to around £750,000.

If I were persuaded that the sole reason for the sale falling through was the ongoing subsidence movement, I might be inclined to make an award here. Although I should point out that any award, I might be inclined to make, would be subject to our service's financial limits.

But having considered the homebuyer survey, I'm not intending to direct Aviva to cover N's alleged losses for the sale falling through. This is because the homebuyer's survey identified numerous other significant issues, in addition to ongoing movement. These included the render and damp issues, which I'm currently persuaded N is responsible for, as well as issues with the roof, rainwater fittings, and fascia. So, based on this, I can't reasonably conclude that the sole reason the sale fell through was because of the ongoing subsidence issues.

Squatter damage

In 2019, squatters gained access to N's property using a key box used by Aviva's contractors. They caused significant damage which N wants Aviva to cover. Aviva says there is no cover under the policy for malicious damage caused while the property is vacant. But N says the only reason the property was vacant was because of Aviva's poor handling of matters up to that point.

Again, I accept that Aviva's handling of the initial claim and repairs was poor. But I don't agree that it is responsible for the damp issues which manifested following N's renovations. And from what I've seen it was these damp issues which prevented Aviva from completing the repairs required as a result of the further subsidence movement. So, as I'm minded to conclude that N (by virtue of its contractor) is responsible for the damp issues, it follows that I don't think Aviva is responsible for the property being vacant at the time the squatters gained access.

Insurers are entitled to set the risks which they are and aren't prepared to cover. In this case, Aviva specifically set out in the policy wording that it wouldn't cover malicious damage where a property was vacant. This is likely because a property is at a higher risk of suffering this type of damage when vacant.

So, as the type of damage reported is specifically excluded, and because I don't think Aviva are responsible for the property being vacant, I'm not currently intending to direct Aviva to deal with the claim for damage caused by the squatters.

Compensation

It isn't in dispute that Aviva hasn't handled N's claim well. It failed to deliver a lasting and effective repair initially. It also doesn't seem to have appropriately engaged with N's complaint about the quality of its initial repairs, when this was first raised – which is what resulted in N having the works carried out by its own contractor.

I've also seen that there were several periods of unexplained or unreasonable delays, some of which I think can be solely attributed to Aviva. Aviva has acknowledged this and has offered £2,000 compensation.

As N is a commercial entity, it cannot experience distress, only inconvenience. I also note that there seems to have been a period of delay, early in the claim, which was caused by N, rather than Aviva. This is based on a letter which was sent to N in November 2014, which stated Aviva had made several attempts to begin repairs but received no response. So, I can't fairly conclude that Aviva is solely responsible for all of the delays, or the impact they had on N.

Taking everything that's happened into account, I think the £2,000 compensation offered is sufficient to compensate N for the inconvenience it has experienced, as a result of the issues and delays which Aviva is solely responsible for. So, I'm not intending to direct Aviva to increase this amount."

I said I was intending to direct Aviva to reimburse N £11,890 for the scaffolding, rendering, external painting and interior plastering and £1,207.50 for the interior decorations. To these amounts I said I was intending to direct Aviva to add 8% simple interest. I also said I was minded to conclude that Aviva's offer of £2,000 compensation for the poor handling of the claim was fair.

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

N provided a detailed response to my provisional decision. In summary, it said:

- It accepted my findings, and suggested awards, regarding the reimbursements and the compensation for the claim handling.
- It didn't accept my conclusions about the damp issues, for the reasons previously stated. It maintained that Aviva had failed to adequately investigate the quality of its previous works. So, N said it reasonably could have taken no action at all. It said it shouldn't be penalised for attempting to take action to mitigate its losses. Ultimately it says that, but for Aviva's inadequate repairs, no damp would have occurred.
- It has evidenced the property was in an excellent condition from August 2016 onwards. So rather than awarding no loss of rent, the period loss of rent should be paid for should simply be amended to the period August 2016 to August 2019.
- It said a report was completed by a subsidence specialist in 2019 which it hasn't had sight of. But it believes this report confirms the previous poor repairs and that the subsidence rendered an otherwise rentable or saleable property as neither. It wanted me to obtain and review this report, if I hadn't already had sight of it.

- It didn't accept that the sale fell through for a multitude of reasons. It says the other issues could be easily remedied, but subsidence or potential subsidence will likely always put off a potential buyer.
- It didn't accept my findings regarding the squatter damage for the reasons already stated.

Aviva didn't respond to my provisional decision, and the deadline to do so has now passed, so I'm moving forward with my final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Several of my provisional findings have been accepted by N and not commented on by Aviva. So, I'll not be commenting further on these issues as part of this decision. Instead I'll maintain my conclusions on those points, for the reasons already given in my provisional decision.

I'll focus on deciding those points which remain in dispute following my provisional decision. And as with my provisional decision, I'll address each separately.

Damp issues

I considered the evidence and arguments put forward regarding this issue before reaching my provisional decision.

I accept that there were failings on Aviva's part and that, based on these, it should be required to cover the cost of putting right the damage which resulted, directly, from its failings. It's for this reason I said I was intending to award costs incurred by N for various works.

However, as with my provisional decision, I don't agree that it would be fair to hold Aviva responsible for further damage which happened subsequently, following repairs undertaken by N's own contractor. While I accept the fact that N's contractor only needed to carry out work because of Aviva's errors, I don't think this absolves that contractor from responsibility for the quality of its own work.

Had N not instructed its contractor to carry out repairs, and damp materialised prior to Aviva intervening, then it could be argued that Aviva's failings or inaction directly led to the damp issues. In these circumstances, I would likely hold Aviva responsible for putting right the damp issues and resultant damage. But in this case, as explained in my provisional decision, I think the chain of causation (and thus of Aviva's responsibility) was broken when N's contractor carried out works.

Ultimately, I think the damp issues were caused by the works carried out by N's contractor. And I don't think it would be fair or reasonable to direct Aviva to cover the cost of putting this right.

Loss of rent

I can confirm that I have had sight of the subsidence expert's report referred to by N in its response to my provisional decision, and that I had considered this when reaching my provisional decision.

I explained in my provisional decision why I didn't think the sole reason N lost out on a prospective tenant in 2015 was because of Aviva's failings. And my view on this point remains unchanged for the reasons already given.

I do accept that N has provided evidence that the property was in a rentable condition following completion of its contractors repairs in 2016. Although I would highlight that it wouldn't remain so for long, owing to the damp issue which materialised shortly afterwards and which I've decided Aviva isn't responsible for. But, in any event, that isn't why I provisionally concluded that Aviva didn't need to pay loss of rent between 2016 and 2019. I said this because once those repairs were completed, N didn't make any attempt to let the property, rather it attempted to sell it instead.

So, as N didn't have a tenant in the property at the time of the loss, didn't lose out on a prospective tenant solely due to Aviva's actions, and didn't attempt to let the property following its contractor's works, I remain of the view that it wouldn't be fair or reasonable to require Aviva to pay loss of rent in these circumstances.

Loss of sale

I accept N's assertion that a prospective buyer is likely to be put off by mention of subsidence in a homebuyer report. I don't disagree that this was likely a factor in the potential buyer pulling out of the sale. But Aviva wasn't responsible for the subsidence originally, so the very fact the property had suffered subsidence, regardless of Aviva's involvement, may have been an important factor for the purchaser. And in any event, I don't agree that all the other issues highlighted in the homebuyer report were minor, or that they wouldn't have also factored into the buyer's decision to pull out.

While the rainwater fittings and fascia issues may have been minor, the homebuyer report mentioned issues with the roof alongside significant damp and damp proofing issues. I don't agree these are minor issues.

Taking everything into account, I don't think it would be reasonable to conclude that the sole reason N was unable to sell the property in 2016 was the ongoing subsidence movement. So, I won't be directing Aviva to cover N's alleged losses for the loss of a potential sale.

Squatter damage

I explained in detail in my provisional decision why I didn't intend to uphold this element of N's complaint.

Neither N nor Aviva have provided additional comments or evidence on this point. So, in the absence of new evidence, and considering my findings on the damp issue, I see no reason to depart from my provisional conclusions here.

My final decision

For the reasons explained above, and in my provisional decision, I uphold this complaint in part.

Aviva Insurance Limited must:

- Reimburse N £11,890 for the scaffolding, rendering, external painting and interior plastering. To this amount add 8% simple interest* from the date N was out of pocket to the date of settlement.
- Reimburse N £1,207.50 for the interior decorations. To this amount add 8% simple interest* from the date N was out of pocket to 15 February 2021.
- Pay N £2,000 compensation for the poor handling of the claim.

Under the rules of the Financial Ombudsman Service, I'm required to ask N to accept or reject my decision before 15 July 2022.

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

Adam Golding
Ombudsman