

The complaint

Mr H on behalf of the executors of Mrs H's estate is unhappy about Aviva Insurance UK Limited's handling of a subsidence claim under a home insurance policy.

Instead of the executors of the estate for ease I'll refer to Mr H throughout the decision. I will refer to Aviva rather than its representatives throughout the decision.

What happened

Mr H said the delays caused by Aviva and its representatives handling the claim meant he'd no choice but to run up some legal costs to try and resolve the issues. The delays that occurred meant the sale of the property involved took much longer than it should have done. There were further running costs and a loss of investment opportunity and income to Mr H and the other executors. On their behalf Mr H brought a complaint to this service.

Our investigator said we can't under our rules make awards for the financial losses of executors or beneficiaries. Awards can only be made to losses of the estate. He said we couldn't ask Aviva to pay the costs for the executors, these costs had to be from the estate. Our investigator said there was no evidence of this so Aviva didn't have to pay. Our investigator said investment and income losses were private to the individual executors and not to the estate. He said Aviva didn't have to pay for any losses the individual executors and beneficiaries had suffered.

Regarding the legal costs these had been paid for by the executors from their own pockets not the estate. So, he couldn't ask Aviva to consider these costs. For compensation our investigator said he couldn't consider Mr H's personal distress and inconvenience. Overall though Aviva did accept that the claim could have progressed more quickly, and it offered to pay the estate £1,000 compensation for delays and issues caused.

Mr H didn't accept this and asked for the complaint to be passed to an ombudsman for a decision.

In my original provisional decision, I said:

"Under the Financial Conduct Authority rules that we follow Disp 2.7.2 applies here. It refers to complaints that can be brought on behalf of an eligible complainant (or deceased person who would have been an eligible complainant) by the eligible complainant or authorised by law. It is accepted by Aviva that Mr H is acting on behalf of the estate of Mrs H in this complaint.

But this does mean that awards are to Mrs H's estate and we can't award personal amounts lost by beneficiaries or executors. Mr H in this case is a representative of the estate. The consumer/eligible complainant is Mrs H's estate so it can only be estate losses this service can ask Aviva to pay. It also means we can't award Mr H personal compensation for distress and inconvenience.

I don't think there's any doubt that the claim did take a long time to resolve. But there's no doubt that subsidence claims do generally take a lot longer to resolve compared to most other types of claim.

When the claim was made there was a debate around the ownership of the vegetation that was thought to be part of the subsidence problem. The ownership of this was disputed with a neighbour. The neighbour wasn't willing to allow easy resolution of the potential subsidence cause by a traditional repair means. By traditional means I refer to removing or significantly cutting back vegetation and trees, Aviva's preferred option. This was a worry for Mr H as the estate was looking to sell the property.

Other usual subsidence claim checks were carried out too. Such as involving an arborist, drainage contractors and a heave assessment.

A copper root barrier was considered by Aviva. But there would still need to be plant and machinery onsite and despite attempts to convince the neighbour to allow this, he wouldn't. So, this option couldn't be pursued any further.

Mr H was still keen to sell the property and was taking legal advice, including from a barrister, about court options against the neighbour. Mr H said he felt he had to act as Aviva had said his claim was "on hold" when he needed to get it concluded. But I can see from Aviva's records it made him aware that such legal costs were not included within the policy. Also, Aviva records showed Mr H had said he wanted to take the neighbour to court, but Aviva wasn't sure the lawyer was aware of up to date case law and it was worried Mr H might end up wasting his money. In discussion with Mr H Aviva advised it didn't think there was a good prospect of success against the neighbour in court.

There's no doubt the claim reaching a conclusion was driven by Mr H through his efforts. It was his idea to consider a different kind of repair using high powered vacuum suction machines and a lime root barrier. This didn't require any works that would upset the neighbour or require any neighbour permission. Eventually the work was undertaken, a cash settlement was paid for the property reinstatement work and the house was subsequently sold.

But not before Mr H had been charged legal costs of over £23,000. Mr H later raised his concerns about the upkeep costs of the property while the claim was outstanding and the loss of investment and income due to not being able to sell the property earlier. Aviva didn't accept this it said the legal costs were disproportionate and the root barrier, drainage work and cash settlement for the reinstatement work had cost substantially less than the legal advice Mr H had paid for. Aviva said it didn't know how much experience the law firm had in dealing with subsidence cases and noted it had gone to counsel rather than a specialist surveyor for advice. Aviva said the crucial expert evidence of the structural engineer hadn't been passed to counsel either. Aviva noted the Association of British Insurers Tree Root Agreement wasn't mentioned at all in the legal advice. Or that Mr H could have come to this service for free rather than pay for legal advice. It continued that "when you spent £23,000, you had no expectation that it would be recovered from your buildings insurers."

legal costs

Noted in Aviva's file is a call from early 2020. Mr H was aware Aviva had a legal team, but he was going to talk to his own lawyer first.

Aviva pointed out that it felt the legal costs Mr H later produced were high.

In November 2020 it pointed out via the loss adjuster "We are concerned to see that your solicitor appears to have been pursuing a recovery claim against your neighbour. If insurer's recovery rights are prejudiced, that's a reason for us to discontinue handling your claim for damage to your property. Presumably your solicitors were aware of your insurance claim. They will have warned you about the risk of prejudicing any recovery." Fortunately, it was able to confirm the case hadn't been prejudiced.

It continued "Your policy covers repairs to the property. If any legal assistance is required, we use specialist solicitors. They, in turn, only need counsel's advice in exceptional circumstances. There is no cover under the policy for the legal costs that you have incurred. Unfortunately, we are not willing to contribute to them, particularly since they were incurred without our knowledge or consent."

I think this is fair comment from Aviva. It's clear that initial discussions took place between Mr H and Aviva, but it then appears he did make his own choices regarding legal action and then carried on without further input or advice from Aviva.

So, I don't think it matters if these costs were privately paid for by the beneficiaries or if they were paid by the estate. Aviva had pointed out these costs weren't covered under the policy. I think that's reasonable.

continuing costs

Mr H has laid out expenses and costs he thinks should be paid by Aviva due to the amount of time it took to resolve the claim. In particular he highlighted certain items that I think are costs an executor would potentially pay out for and would reclaim from the estate. But there needs to be evidence and proof needs to be in a format Aviva can accept.

The expenses noted include gardening charges, postage, boiler repairs, utility bills, home insurance and council tax while the claim was running on. Subject to enough proof of this being charged to the estate. I think the evidence provided by Mr H could be considered by Aviva if Mr H agrees to the evidence being shared with Aviva.

I think Aviva would be liable to pay, subject to proof the money was reclaimed from the estate, for around 10 months of costs. Mr H has suggested sale of the property would have completed around 20 May 2020 compared to 5 March 2021. I think this is a reasonable calculation. The proportion of the costs from 20 May 2020 onwards for the annual bills should be paid along with any of the bills that were paid for in their entirety for work or services carried out after 20 May 2020. Mr H can provide a calculation on this for Aviva to check and confirm if he wants Aviva to see the details we currently hold on file and any other invoices for costs noted in the amounts I've listed above. This is all subject to suitable proof these amounts were charged to the estate.

If Mr H agrees and Aviva sees the evidence, if it wishes to see other proof before it will settle, I expect it to be very clear about what documents it needs. Mr H can confirm if he can or is willing to provide these. I will then conclude an outcome in my final decision.

investment and income opportunities missed

I think I can understand how Mr H feels about the missed opportunities and the delay caused to the beneficiaries. But I don't think this can count as a loss to Mrs H's estate. It is a loss personal to the beneficiaries and not something I can make an award for.

compensation

I've mentioned earlier that Mr H was one of the main reasons why the claim did in the end get concluded when it did. So, there's no doubt he has put time and effort into dealing with and producing information to validate the claim. This will have caused him inconvenience and stress. Although I accept this it doesn't mean I can ask Aviva to pay compensation. I mentioned this at the start of my findings. To do so would be outside the scope of our rules. I can't make an award to Mr H as he is only acting on behalf of the eligible complainant. But Aviva has made an offer of £1,000 for this as it accepts there were delays and the claim could have been resolved more quickly. This amount is the amount paid by the estate for the policy excess so effectively is a refund of that cost."

Responses to my original provisional decision

Mr H sent in detailed further submissions covering a wide range of points. He also referred specifically to "*significant new evidence*". But I'll respond only to the really key elements and in relation to what I see as directly linked to the original complaint.

Mr H referred to why the property wasn't put up for rental, and how much income could have been gained from this compared to the situation they found themselves in. Mr H also talked about if the property had been "*mortgageable to obtain liquid funds to the same value of the house*" then the executors could have used these funds as they so wished. Mr H suggests this means the complaint will need a second provisional decision to allow Aviva to consider it.

Mr H is unhappy that Aviva has many cases with this service, and he feels is therefore more knowledgeable in how to put its evidence across. Whereas he is purely a layman and hasn't had any feedback from this service regarding how he could put forward his case more effectively. Mr H said that he indicated previously that in view of the size of the amounts he feels have been lost he expects to be given further opportunities to put forward further calculations in other ways. This way he feels he can satisfy any requirements this service may have to agree to uphold the complaint for the amounts he wishes to claim. He wants feedback before any final decision is issued.

Mr H is unhappy that my provisional decision quotes representations from Aviva but none of his and he feels this is one sided. He suggests some "*fact checking*" is required here. I've considered all of Mr H's varied points, but I'll use Mr H's bullet points here to highlight some of his key issues:

- No legal cover in policy. Mr H contends this is completely irrelevant. As his claim is for Aviva failing to carry out its obligations.
- Up to date case law; and chances of success. Mr H's barrister felt the prospects of success under certain criteria would have been high. Aviva mixed up recovering repair costs with Mr H's right to require the neighbour to stop the hedge being an ongoing nuisance.
- The legal costs compared to the lime root barrier being disproportionate. How could Mr H compare these as they were unknown in advance. The barrier cost is therefore irrelevant. He was considering this on the basis of the potential housing market value crash.
- Mr H said in comparison to his legal costs, the cost of the lime root barrier was very similar to the copper root barrier. These aren't substantially less than the legal outlay.
- Crucial expert evidence. This was only a short letter produced by a surveyor after a brief visual inspection. This had been completely superseded by Aviva's structural engineer's reports. So, it wasn't crucial at all, it made no difference.
- ABI tree root agreement. Had no impact on Mr H's right to deal with the nuisance with the neighbour.

- Mr H could come to this service 'for free'. Aviva gave the impression Mr H didn't need to as it didn't appear Aviva was failing to carry out any legal obligations. The process has taken a long time with this service, without considering the expected risk of a collapsing housing market.
- Aviva email November 2020. Mr H said suggesting he was pursuing a recovery claim was ridiculous. He said this was to intimidate him so he wouldn't complain.
- Aviva knew throughout he was dealing with his solicitor. Mr H said there's a phone call recording that shows this.
- Disallowance of all legal costs. All the legal costs are down to Aviva's failures. Whatever happened there would have been legal expenditure. Mr H's solicitor had to do a significant amount of work to understand the situation. At the very least Aviva should cover the first cost of £3,621.60.
- Not claiming for gardening or postage – Mr H doesn't have any costs for these items during the time limit set. But Mr H is claiming for additional conveyancing costs. For the "contract rider" while completion couldn't occur with their buyers renting arrangements. He also wants such conveyancing costs related to extending the rental period. Along with the amounts accepted in the provisional decision which Mr H said were council tax, home insurance, gas, electricity, broadband, utilities, and boiler repairs.

Mr H sent in details of invoices and spreadsheet calculations. Mr H said he was expecting this service to direct Aviva to pay. But requests that only his file titled information pack ongoing costs zip can be passed on to Aviva. He said earlier examples should not be sent to Aviva. Mr H is wary Aviva may ask for things that are impossible or unreasonable to provide. As he's already spent a large amount of time getting details to this stage.

Mr H said he hoped the intention was for he and Aviva to agree before I issue a final decision, and this service will step back in if the parties can't agree. Mr H would rather not have to go to court.

Mr H says Aviva will contrive to use the provisional decision about proof that amounts were reclaimed from the estate to refuse to pay. He said residual estate details show the full estate accounts. Mr H said numbers 4 and 12 make it clear around all expenses deducted from the estate leaving the nett residual estate and that's been distributed equally. And each executor individually claimed has been reimbursed by the estate. Mr H would like this service to direct Aviva that this service has now seen proof of expenses regarding the estate.

Aviva responded to say it will only pay the estate direct, and only when it sees evidence to show the estate paid out these amounts. But based on those principles it agreed it will pay for:

- Standard electric charge.
- Council Tax.
- Gardening.
- Home insurance.
- Boiler repair.

Aviva said this would be dependent upon the property being vacant and no new tenant or owner living there during the accepted period.

So, in my second provisional decision I said:

“Regarding the property rent or mortgage options these don’t seem to me to be points raised previously by Mr H directly with Aviva, so I can’t comment on them. I can only deal with the original complaint brought to this service.

As these are new issues and to use Mr H’s own words “significant new evidence” I can’t comment on such evidence as Aviva would need to see it and respond directly to Mr H on those points. I don’t know if this will lead to a further complaint.

Based on Mr H’s response and the time he must have taken to prepare it I fear that I wasn’t clear in my provisional decision. And if that’s the case I wish to apologise. I’ll aim to clear these points up here.

Mr H feels he is at a disadvantage due to a lack of knowledge of our process compared to Aviva. I can confirm we consider all the evidence from both sides and accept that consumers may not have the experience an insurer may have. That’s why my provisional decision refers to Mr H providing proof in terms of the costs to the estate for Aviva to review.

Mr H says he hasn’t been given feedback, I’d hoped my provisional decision was clear on this point. Aviva will be reviewing Mr H’s evidence with the key factor being - has the amount claimed for been paid by the estate – that’s it. There are no special requirements or need for any specialist knowledge, purely evidence that shows the estate paid for the items. I agree that Aviva should reimburse the estate for such amounts subject to the proof from Mr H. I don’t think Mr H is missing out any particular skills or ability to navigate the complaint. This service aims to ensure the process can be used by a layperson. This should hopefully put Mr H at ease that he isn’t suffering any issue of perceived disadvantage he might currently feel.

Based on Mr H’s stance that he doesn’t want Aviva to see his earlier evidence or most of the later evidence including the extra details he has now produced, that makes everything I’ve written above a bit of a moot point. If Mr H only wants Aviva to see his one set of breakdown costs not the actual evidence, then Aviva can’t be expected to pay.

Just to make the point clear, the provisional decision gave room for some costs to the estate to be paid by Aviva. But as this service has stated throughout this isn’t about the individual costs of the executors. The costs need to show a loss from the estate. The reason for this is to ensure the estate (the eligible complainant) is treated fairly and reasonably in line with the rules and jurisdiction that binds this service. If that evidence isn’t made available to Aviva, if Mr H isn’t willing to provide it, or can’t get it, it can’t be put before Aviva and it can’t be expected to pay.

The provisional decision allowed Mr H and the executors a further opportunity to produce records showing the cost impact on the estate. It is up to the executors/estate to allow Aviva to review it. At the moment Mr H is declining to provide the detail to Aviva so without Aviva seeing these Mr H isn’t going to reach a settlement on the areas I’ve said Aviva should review.

Either Mr H provides evidence to Aviva, or he doesn’t. If he does then I expect Aviva to be fair about any other evidence, it needs so Mr H can confirm or decline to provide it. I think that’s a fair outcome.

Within the amounts I did refer to I don’t recall referring to broadband costs and I didn’t link that to utilities. So, I don’t think that broadband cost is included within the amount Aviva needs to consider. Also, for the additional conveyancing costs Mr H now raises these appear new so need to be discussed directly with Aviva not through this service.

Mr H says this service should direct Aviva to pay based on the evidence he's not willing to allow Aviva to review. But this service has stated Aviva only needs to pay the proven estate expenses and Aviva is entitled to see the evidence of this. Mr H has put much effort into explaining what I need to do, and I accept that as a layperson he isn't as familiar with our processes as Aviva will be. But it is still a fair and reasonable outcome for Aviva to see the evidence for itself before it agrees to pay.

I note the Mr H has confirmed the costs will not include gardening or postal charges.

In relation to the May 2020 to March 2021 timeline I'd like to confirm that these dates were put forward by Mr H and I feel are reasonable.

Aviva has accepted that subject to evidence it will settle the costs based on certain conditions. But I don't agree with its point about tenants or owners. I think the first provisional decision dealt with that issue by putting in place a time limit for the costs due to the delays involved in resolving the claim. The timeline was from 20 May 2020 compared to 5 March 2021 and I think that's the important time limit rather than Aviva's point about whether or not the property was vacant.

As Mr H doesn't want this service to pass on any of his other or earlier evidence to Aviva there isn't much more I can say. It's for Mr H to decide if he wishes to provide directly to Aviva the evidence of the estate's costs for the items agreed and the estate account details for Aviva to pay.

My second provisional decision

I intend to uphold this complaint.

I intend to require Aviva Insurance UK Limited to:

Pay costs for expenses proven as incurred by the estate towards boiler repairs, utility bills, home insurance and council tax while the claim was running on. This is for the proportion of costs between 20 May 2020 and 5 March 2021, for bills that started before this date and any costs entirely incurred between the two dates Mr H can provide a calculation and evidence directly to Aviva."

Responses to my second provisional decision

Aviva responded and agreed to pay the following costs based on the evidence it had been sent:

- Council tax
- Gas
- Electric
- Phone

It calculated this cost to be a total of £486.38 and it has agreed to add interest of £67.27. It also agreed to the additional insurance premium costs of £620.17 plus interest of £87.59. In relation to the boiler and travel costs Aviva offered £333.20 plus interest of £44.41. Aviva also accepted that the claim did cause a delay in the sale of the property, the new owner rented and so Aviva agreed to pay the solicitor fee of £500 plus interest of £56. Aviva accepted the costs provided on Mr H's own spreadsheet at £2195.03.

Aviva confirmed no gardening and postage costs were presented.

It concluded regarding rent figures provided, that this wasn't part of the complaint. Aviva said Mr H should be approaching its claims office. It confirmed it would be willing to review this.

Mr H sent in a further detailed response with an extra round of additional attachments. I'll keep the details of his response to the main factors:

- Loss of rental income - Mr H will now make a further separate complaint to Aviva for this issue.
- Regarding allowing Aviva to access the evidence details and any issues Mr H has resolved this by passing the details directly to Aviva.
- Mr H continued that if the issue is that the first of these spreadsheets has "very minor redactions" then this hasn't been explained to him. He says the points redacted only apply to transactions outside of this claim but within the estate and so completely irrelevant to the claim. If this is a problem Mr H said he can resolve this with a completely unredacted spreadsheet if necessary.
- Mr H said previous evidence wasn't suitable to send to Aviva as it contained sensitive personal information.
- Mr H referred again to the scope of the expenses list and suggested there was some confusion over these. He referred to *"each and every one being laid out in detail at the same time"*. Mr H also pointed out that he never claimed for gardening or postage costs and he doesn't know why they were added to the list while extra conveyancing costs are not included. He thinks it should be. But he said if this final point isn't considered under this complaint, he will include it with his loss of rental income claim he will make to Aviva.
- Mr H noted there was no mention of a gas standing charge even though there was mention of the electricity standing charge. But for the sake of simplicity regarding this claim Mr H has chosen not to claim for any gas usage only for the gas standing charge.
- Mr H doesn't understand why broadband isn't included as a utility. He thinks it is and should be included. But if he can't include it, he will add it in to his further future complaint to Aviva. Mr H said that he needed the broadband when he was visiting or sleeping at the property.
- Mr H brought up the time period. He said the home buildings insurance clearly had to continue up to the date of sale completion.
- Legal costs – Mr H said Aviva did explicitly tell him to pursue legal recourse against the neighbour. He also said it was the only option available according to Aviva. Mr H said this service hadn't been provided with a full file and Aviva hadn't provided a note with details after a telephone call had been transferred between Aviva staff and this was when he was told to take the legal action. Mr H wants a time extension granted as he has asked Aviva for a copy of the call recording. Otherwise this will become another further complaint later on. Mr H also provided call recordings he said proves Aviva were encouraging his use of legal proceedings.
- Mr H did get a copy of the call referred to above and pointed out that within the call he mentions sending a solicitor's letter to the neighbour.

In my third provisional decision I said:

"I take Mr H's point about a loss of rental income claim and Aviva has said Mr H can make contact about this. Mr H has now resolved any issues with the spreadsheets by passing these on to Aviva directly. I'm unaware of any issues he refers to about his redactions. Originally, I'd noted that Mr H could claim for gardening and postage but as he isn't going to, I'm a little unsure why the point has been raised further. Mr H refers to confusion over the expenses he claims but I'm not sure where that confusion is. In my second provisional decision I referred to utility costs rather than specifically gas or electric. Importantly, Aviva has referred to and made an offer regarding both utilities, so I hope that clears up the issue."

Aviva has also agreed to the extra solicitors cost of £500 so I think that point has reached a fair outcome too. I think I've been clear throughout that I hadn't included broadband as a utility and that remains the position now. But I note Aviva has agreed to pay costs towards the telephone, I think that's fair. The time period for these costs to apply is the time frame put forward by Mr H and accepted by this service and Aviva, I see no reason to change or make any further comment on this. I think Aviva has made a fair offer in relation to this.

I have reviewed the telephone conversations Mr H referred to and forwarded to this service. I think it's clear from the conversations that Mr H explained what he was doing during these calls. Mr H told Aviva his plan of action showing his determination to get a resolution with his neighbour. That's the main point of call recording Mr H passed to this service. Aviva in telephone discussions confirmed in relation to the questions and points Mr H was raising that the answers would depend on the lease and his solicitor would be best able to comment. At another point Aviva confirmed it didn't know what more it can add. From the calls I've reviewed I didn't hear at any point Aviva saying it's going to pay for this, or that it is responsible. There's nothing here in evidence that makes me think Aviva need to pay towards these legal costs. The decision to involve a solicitor seems to have been made by Mr H and the estate. Aviva didn't appear to make the decision and didn't agree to pay for such a decision. I can see there's a note within the extra correspondence sent this time by Mr H dated 3 April 2020 where he says in relation to this subject "we may need to discuss our insurance taking over, as our legal costs are mounting up". I think that Mr H is saying here that Aviva isn't involved, and "our" costs gives the impression he's talking about his or the executor's costs.

I think Aviva has taken a pragmatic view on this complaint and come up with a fair and reasonable offer. For clarity this service checked with Aviva asking who it would be willing to pay the offer amount to. It's complaints handler responded to say "If Mr H provided details, I will pay directly to him. Should this cause any issues with estate or family, then he will be responsible for discussing with them." I think in the circumstances that is a fair outcome and one that avoids any of the issues Mr H referred to previously of Aviva finding ways not to pay. I think Aviva has found a way to simplify all of Mr H's concerns and issues here and in the circumstances it's a fair and reasonable outcome to all the issues raised within this complaint.

My third provisional decision

I uphold this complaint against Aviva Insurance UK.

I require Aviva Insurance UK to pay £2,195.03."

Responses to my third provisional decision

Aviva accepted the provisional decision.

In Mr H's response he confirmed he was happy agreement had been reached on the "continuing costs" amount of £2,195.03.

Mr H agrees that Aviva didn't authorise the legal costs. Although he maintains Aviva should pay anyway as it did nothing to progress the claim. He pointed out that Aviva said nothing could be done without at least partial removal of the hedge, which the neighbour was preventing. Mr H said it was he that found a workable solution. Mr H also said Aviva said it didn't need to do anything under the insurance policy. Because of this Mr H said his only option was legal action. Mr H accepts he expected to have to foot the legal bill. But Mr H continued that now knowing Aviva had made untrue statements, led to him incurring the legal expense which means Aviva should be liable.

What I've decided – and why

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

I'm grateful to both sides for the responses. And I can see the point Mr H is making. But Aviva didn't authorise Mr H's legal costs and it was his choice to take that approach. So, none of the details provided change my provisional decision and it now becomes my final decision.

Putting things right

I require Aviva Insurance UK to pay £2,195.03.

My final decision

I uphold this complaint against Aviva Insurance UK.

I require Aviva Insurance UK to pay £2,195.03.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mrs H to accept or reject my decision before 20 July 2022.

John Quinlan
Ombudsman