

The complaint

B complains about how Aviva Insurance Limited handled its claim on its property owner's insurance policy, following subsidence at some garages it owns.

As a director of B, Mr M brings the complaint on its behalf.

What happened

B had a property insurance policy to cover a number of garages it owned. In 2011 Mr M made a claim after noticing subsidence damage to some of the garages. Aviva accepted the claim and identified a nearby tree that was causing it. The tree was owned by a third party, but it arranged for the tree to be pollarded and this stabilised the garages at the time.

However in 2016 cracking appeared again and Mr M contacted Aviva again. Aviva contacted the owners of the tree to ask for it to be removed or reduced. The tree was felled in 2018.

In 2020 Mr M made another claim as there was further subsidence damage to one of the garages. Aviva accepted the claim and concluded the same tree and its saplings were continuing to cause the movement. It wrote again to the third party to seek removal of the tree.

However Mr M was unhappy with this. He said if Aviva had taken the required action of removing the tree in 2018 then the problem would already have been solved. And he didn't think it was fair that Aviva was charging an additional £2,500 excess for the new claim as it was a continuation of a previous claim. He made a complaint but Aviva didn't uphold it, so he brought it to this service.

Our investigator didn't recommend the complaint be upheld. He said that as the tree was the responsibility of a third party then Aviva weren't able to take responsibility for it and couldn't be held accountable for the fact it wasn't removed or maintained.

Mr M wasn't happy with this outcome. He said Aviva had taken responsibility for the tree in 2011 when it accepted his first claim. And had failed to take appropriate action since, which had meant the damage had continued. He asked for his complaint to be reviewed by an ombudsman.

On 10 March 2023 I issued a provisional decision which stated as follows:

'When a claim for subsidence is made, the first step is for the insurer to determine the cause and mitigate it in order to ensure the structure stabilises.

Here, as part of the 2011 claim, Aviva identified the cause of the damage as a nearby tree. However the tree was the responsibility of a third party, which meant that in order for any action to be taken involving the tree, Aviva had to pursue this third party for them to take the required action. This means it isn't able to carry out the action itself without the authority of the third party.

I can see that across the three claims since 2011, Aviva has liaised with the third party in

order to arrange mitigation work. And when this has been carried out, the garage has appeared to stabilise. So I think Aviva has done all it could in the circumstances.

I appreciate Mr M's frustration that the tree wasn't removed as part of the 2016 claim, however as all Aviva is able to do is to pursue the third party to take action, and here the third party opted to fell and maintain the tree, I don't think Aviva could have done any more.

At this stage Aviva has confirmed it's obtained agreement for the tree to be removed, so I'd now expect this to take place and for Aviva to promptly carry out necessary repairs to the affected garages. However from the evidence I've seen I think it's done all it could in addressing the problem to date.

Aviva has requested an excess of £2,500 for the most recent claim and I don't think this is fair. The current claim is clearly a continuation of the two previous claims as Aviva has confirmed each has been caused by the same tree and with damage occurring to the same area of the garage. For this reason, any repairs or mitigation should fairly be dealt with as part of the same claim as was originally made. And for this reason no further excess should be charged for this claim. I therefore intend to direct Aviva not to charge an excess for the recurrence of subsidence in 2020 and refund any amount already taken for this excess.'

Response to my provisional decision

Aviva responded and accepted my provisional decision.

Mr M didn't accept the decision. In summary he said in response:

- Aviva carried out the initial works, not the neighbours who own the tree so it is responsible for the problems he is experiencing now.
- The tree wasn't properly felled which has meant it has continued to grow and if this had been done properly the most recent instance of subsidence wouldn't have happened.
- Aviva should now re-visit to ensure the trees are properly felled and repairs are carried out.

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.

The tree causing the subsidence at B's garages is owned by a third party – the owners of a neighbouring property. While the owners have signed mandates in order for Aviva to carry out necessary action on the tree in order to address the subsidence issue, the owners still have ultimate responsibility for the tree. This includes the ongoing pruning and maintenance.

Aviva's expert has said that the ongoing maintenance hasn't been carried out. And while Aviva had a mandate to take action against the tree, the ongoing maintenance is still the responsibility of the owners, so I can't hold Aviva responsible for this.

I note Mr M has said that a tree surgeon commented that Aviva hadn't carried out the correct action when felling the tree initially. However I've not seen evidence that persuades me this was the case or that this was the cause of the most recent instance of subsidence.

Aviva has shown that it has followed its own expert advice when taking action to try and resolve the problem by felling the tree. And while it now seems the measures it took weren't enough to stop the subsidence, this is only apparent now there has been a further instance.

But from what I've seen, Aviva took appropriate action at the time and followed the guidance of its expert reports.

Mr M has said that he now wants Aviva to re-visit the site, kill off the trees and carry out the appropriate repairs. As part of this complaint, I'm only considering Aviva's actions up until it issued its final response to Mr M's complaint in November 2021. However as Aviva has accepted the claim, I'd expect the claim to progress promptly and for Aviva to provide an effective and long lasting solution to the subsidence.

Having considered Mr M's comments, I see no reason to depart from the findings in my provisional decision.

final decision

For the reasons I've given, I uphold B's complaint in part and direct Aviva Insurance Limited to not charge an excess for the episode of subsidence reported in 2020 and refund any amount already taken as part of this excess.

Under the rules of the Financial Ombudsman Service, I'm required to ask B to accept or reject my decision before 25 April 2023.

Sophie Goodyear
Ombudsman