DRN-4361258

The complaint

Mr and Mrs P are unhappy with the amount offered by Aviva Insurance Limited to settle a claim made under their home insurance policy.

Reference to Mr and Mrs P includes anything said or done by their representative.

What happened

The circumstances of this complaint aren't in dispute, so I'll summarise the main points:

- Mr and Mrs P got in touch with Aviva about crack damage to their home. Aviva appointed a loss adjuster, G, who accepted a claim for subsidence. After carrying out investigations and finding it was unable to remove a tree said to be causing the subsidence, G agreed to resolve the problem by underpinning the building and carrying out repairs.

- G agreed for an engineer, W, to design the underpinning and prepare and cost a schedule of work. It did so and estimated the cost at around £225,000, excluding VAT. Another company estimated the cost at a higher figure.

- Around this time, Mr and Mrs P discovered that their neighbours intended to demolish and rebuild their house. Given they were likely to face significant disruption to their own home, and from their neighbour's, for a long period of time, Mr and Mrs P decided to sell their home and asked G to settle the claim by cash payment.

- In November 2021, G made an offer to settle the claim for over £240,000. This included the cost of the building work based on W's estimate, plus the expected costs of alternative accommodation and removals, all excluding VAT. Mr and Mrs P accepted the offer later that month.

- G confirmed it had recommended the payment to Aviva in December but the payment wasn't made. In February 2022 G asked Mr and Mrs P to sign a 'form of discharge' for the payment to be made. They did so later that month.

- Payment still wasn't made, and Aviva withdrew the offer. G said it had made an error and its offer may have over-indemnified Mr and Mrs P because the schedule of work contained unjustified costs, provisional sums, and other excessive items.

- Mr and Mrs P complained. Aviva accepted it had caused a loss of expectation by making and withdrawing the claim settlement offer and offered £100 compensation.

- Mr and Mrs P didn't think this was fair. As they'd agreed to the offer in full and final settlement, they thought it had become legally binding and Aviva was bound to pay it. They took legal advice which supported their point of view. They sold their home in April 2022.

- Aviva reconsidered the matter and paid a reduced settlement of around £165,000 in May 2022. It also added six months of interest to this amount to cover the period of time during which it had recalculated the offer.

- Mr and Mrs P referred their complaint to this Service. They thought the original offer was binding and Aviva should fulfil it. They asked for Aviva to pay the difference between the original and the reduced offer, plus interest.

- Our investigator didn't think the complaint should be upheld. He said Aviva was obliged to pay a fair cash settlement – and he thought the evidence showed Aviva's revised offer fulfilled that obligation. He said the compensation offered was reasonable for the loss of expectation suffered by Mr and Mrs P.

- Mr and Mrs P disagreed with our investigator and asked for their complaint to be referred to an Ombudsman. In summary, they said:

    - This Service isn't required to follow the law and can consider what's fair and reasonable. But we should consider that a formal offer was made and accepted and that amounted to a contractual agreement – which Aviva broke.

    - Even if that point were set aside, Aviva's revised offer was unreasonable. It had arbitrarily removed a number of items from the schedule of work. And it had replaced the cost of alternative accommodation and removals with the cost of a temporary kitchen – even though Mr and Mrs P couldn't be expected to live at the property whilst work was ongoing.

    - Aviva had plenty of time to review and check G's proposed offer before putting it to Mr and Mrs P. And G had been clear that it had provided a breakdown of the offer to Aviva prior to putting it to Mr and Mrs P. So it's clear a full review had been carried out before the original offer was made.

My provisional decision

I recently issued a provisional decision in which I said:

> I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.
>
> It's not in dispute that Aviva accepted the claim was covered by the policy and both parties agreed a cash settlement was an appropriate way to settle the claim in principle. So I won't comment on these points any further.
>
> The dispute is about how much Aviva should pay to settle the claim. The key questions for me are whether its original offer was binding and what a fair and reasonable amount for the claim settlement would be. I'll also consider whether there is anything else Aviva should do to reach a fair and reasonable outcome.
>
> *Was Aviva's offer binding?*
>
> The key point Mr and Mrs P have made is that Aviva was legally required to pay its original offer because it had made a binding agreement to do so.

On the other hand, Aviva says it made a mistake when it presented Mr and Mrs P with its original offer. It considers it has the right to correct that mistake by revising its offer – and paying compensation for the impact of that mistake.

Mr and Mrs P took legal advice from a solicitor I'll refer to as N. In summary, N thought the agreement was binding. I think the following points they made are key:

- The form of discharge was a valid offer and it was accepted by Mr and Mrs P.
- It recorded an agreement for Aviva to pay Mr and Mrs P £242,556.11 in full and final settlement of the subsidence claim. It was not subject to any other contingencies.
- There was no mistake of fact or law which voided the agreement.
- An error of judgement and/or a mistake caused by one party's carelessness or negligence doesn't void or otherwise change the agreement.
- Only a mistake which fundamentally changed the subject matter of the agreement could void or otherwise change it.
- G had the estimate based on W's schedule of work and had the opportunity to raise any issues with it before making an offer.

Whilst Aviva considers its entitled to withdraw the offer and put right its mistake, it hasn't challenged the legal position set out by N or raised any legal arguments and/or case law to support its position.

I am required to take into account relevant law when deciding what is fair and reasonable in all the circumstances of a complaint. Given the nature of this complaint, I've considered the relevant law in contract, particularly in relation to mistakes in respect of settlement agreement contracts in an insurance context.

Where Aviva has made a mistake in its offer to settle the claim, and that offer has been accepted by Mr and Mrs P, Aviva couldn't normally escape the settlement agreement contract on the basis that it didn't intend to settle for the amount set out in that agreement.

However, there are circumstances where Aviva could treat the settlement agreement contract as void or as effective on the terms it intended. For example, where Mr and Mrs P had accepted the offer in the knowledge that the terms differed from what Aviva intended.

But I don't consider these circumstances have arisen here. That's because I haven't seen any evidence to suggest Mr and Mrs P knew, or ought to have known, that G intended to make a lower offer but mistakenly made a higher one.

Prior to asking Mr and Mrs P to sign the form of discharge, G was clear that it had agreed the offer with Aviva and that it had asked Aviva to process the payment.

So I'm not persuaded Mr and Mrs P were ever given the impression G had made, or even might have made, a mistake when setting out the offer. On the contrary, they were given the impression they would receive the payment imminently, which I think indicates G and Aviva were confident the offer was correct.

I've also considered whether the settlement agreement contract was entered into based on a fundamental mistake such that it is likely to be void.

An example of a fundamental mistake in a contract would be where there was no underlying insurance agreement between the parties, or Aviva could show the nature of the loss settled by the agreement would not have fallen within the scope of the insurance policy. In this case, I don't consider it likely a mistake as to the settlement amount was a fundamental one because this would not remove the basis for the contract. Aviva has not argued such a mistake arises in this complaint in any event.

Therefore, taking into account relevant law, N's legal arguments, Aviva's position, and the particular circumstances of the complaint, I consider it is likely the full and final agreement set out in the form of discharge accepted by Mr and Mrs P was binding. That means Aviva couldn't escape that contract for settlement on the basis that it made a mistake as to what would be a fair settlement amount.

However, I do have scope to depart from the law where I consider it would be fair and reasonable to do so in all the circumstances. So I've gone on to consider whether it would be appropriate for me to do so taking into account Aviva's point that it would not be fair and reasonable for it to pay the amount it previously agreed to under the settlement agreement contract on the basis it would over indemnify Mr and Mrs P.

What's a fair and reasonable amount for the cash settlement?

Aviva says this would be the reduced offer. Firstly, because the schedule of work contained items that weren't required, hadn't been justified, or were provisional sums. And secondly, because Aviva notes Mr and Mrs P have since sold their home, without carrying out any work. So it considers the financial loss to them is the loss of value of their home as a result of the subsidence damage. Aviva doesn't believe that loss of value is greater than the reduced offer – and Mr and Mrs P haven't provided any evidence to suggest otherwise. Aviva has noted Mr and Mrs P's point that they agreed a sale price for their home based on the original offer. It accepts that it would be unjust for Mr and Mrs P to suffer financially if the revised offer impacted any binding agreement they'd made. Aviva has invited Mr and Mrs P to set out any such impact, but they haven't done so.

Mr and Mrs P argue that their choice to take a cash settlement has saved Aviva a significant sum of money. They note the lowest cost estimate of £225,000 was based on a desktop assessment and they say it didn't take into account all the costs a builder would actually face in completing the work. They note the only builder who visited the property estimated the cost at over £250,000. And bearing in mind the costs of alternative accommodation, removals, and the rise in building costs over time, they expect Aviva would likely have paid over £300,000 had the work gone ahead.

Whilst I note Aviva's point that Mr and Mrs P haven't set out a financial loss over and above the reduced offer as a result of selling their home, the loss of value due to subsidence isn't the method by which Aviva offered to settle the claim – originally or when it reduced the offer. At both times, Aviva was estimating what it thought the likely cost of building work and associated costs would be. Since this is how Aviva itself has chosen to settle the claim, even when it knew the work wouldn't go ahead as the house was going to be sold, I don't see any reason to change that method of settlement now.

The next step is to consider why Aviva reduced the settlement – and whether that's fair.

W initially estimated the cost of work at around £225,000. Aviva has reduced it to around £160,000. It's provided a spreadsheet to show which items have been removed or reduced from W's estimate. But it does very little to explain *why* that should be the case. Most of these items have written next to them 'not required' but without any elaboration as to why that might be. Some of these items have no comments whatsoever. I'm not satisfied any of this is sufficient to justify removal or reduction of items.

A few items do have a brief explanation and some of those seem to have merit. For example, around £7,000 for insurance that Aviva says the builder should already have. So there may be some items which can justifiably be removed or reduced from W's estimate, perhaps around 10-15%.

W's was a 'desktop' estimate. Generally I think an estimate based on seeing the building and the site first hand is likely to be more accurate, so the builder's estimate is likely to be a better reflection of the costs involved in the work. It was around 15% more than W's. I think that means any justifiable deductions are broadly balanced out by the difference in cost. So overall, it seems reasonable based on the available evidence to estimate the likely cost of the work if carried out at the time was around £225,000.

The original offer also included £15,000 for alternative accommodation and around £4,000 for removals. The reduced offer replaced these amounts with £7,500 for a kitchen pod. The rationale behind this change is unclear. The extent of repair planned for the property was significant, including underpinning a considerable area. It's likely these repairs would have taken many months to complete. So it's highly unlikely that it would have practical or reasonable for Mr and Mrs P to remain at home with this work ongoing for a prolonged period of time. I don't agree the reduction was reasonable.

Taking all of this into account, I'm not satisfied Aviva has shown that Mr and Mrs P would have been over indemnified by its original offer. It seems likely that offer would broadly have been a reasonable estimate of the necessary costs, including the work, alternative accommodation and removals. As that's the method of settlement Aviva chose, that amount looks like a fair and reasonable cash settlement in the circumstances.

Overall, I'm satisfied the original agreement to pay £242,556.11 is likely to be binding, taking into account relevant law, so I consider it fair and reasonable for Aviva to settle the claim under the terms of that agreement by paying the remainder. And even if I'm wrong about the likely binding nature of the settlement agreement, I'm satisfied it would be fair and reasonable for Aviva to pay the originally agreed amount in full as a fair and reasonable estimate of the claim value in all the circumstances. Therefore, I don't consider it appropriate to depart from the relevant law which is likely to apply in the circumstances.

As Aviva's original offer was £242,556.11 and its reduced payment was £166,953.29, that leaves a difference of £75,602.82 to pay.

Is there anything else Aviva should do to reach a fair and reasonable outcome?

Aviva paid the reduced settlement in May 2022 and added six months of interest to it. That covers the period of delay in making that payment since Mr and Mrs P accepted

the original offer in November 2021. As Aviva caused Mr and Mrs P to be without this money unfairly for around six months, I'm satisfied this payment of interest was a reasonable remedy.

For the reasons given in the section above, I've provisionally found that Aviva should fulfil its original offer – and that means paying an additional £75,602.82. As this amount should also have been paid in November 2021 and Mr and Mrs P have been without that money unfairly in the meantime, I'm satisfied interest should be added from November 2021.

It's accepted that Mr and Mrs P suffered a loss of expectation as a result of Aviva's mistake. They were led to believe the claim would be settled based on the original offer – but they received significantly less. That would have caused them avoidable distress. And it was compounded by the time it took Aviva to deal with this matter, leaving Mr and Mrs P with a great deal of uncertainty for longer than they should have been.

Aviva has offered £100 compensation. The interest it has paid already, and will go on to pay, is a fair remedy for Mr and Mrs P being without the money for extended periods. For the loss of expectation and uncertainty caused by Aviva, I'm satisfied £100 compensation is fair and reasonable. If it's already been paid, Aviva need not doing anything further on this point.

What I've decided – and why

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

Mr and Mrs P said they had nothing further to add as they considered my provisional decision an accurate and objective summary of the case.

Aviva didn't reply.

As neither party challenged my provisional decision or provided any further evidence or comments for me to consider, I see no reason to depart from my earlier findings or discuss them further.

I remain satisfied they're a fair and reasonable remedy to the complaint for the reasons given above.

My final decision

I uphold this complaint.

I require Aviva Insurance Limited to:

- Pay £75,602.82.
- Pay interest on this amount at 8% simple per year, from November 2021 to the date of settlement*.
- Pay £100 compensation if it hasn't done so already.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P and Mr P to accept or reject my decision before 20 October 2023.

James Neville
Ombudsman