

## **The complaint**

Mr B and Mrs T complain about how Aviva Insurance Limited has handled their claim for subsidence on their home insurance policy.

Mr B and Mrs T have been represented by a third party throughout their complaint. However for ease, I've referred only to Mr B and Mrs T in this decision. All references include the actions of their representative.

## **What happened**

Mr B and Mrs T had home insurance that was underwritten by Aviva. They originally had an issue with subsidence at the property in 1996. This was resolved by a partial scheme of underpinning.

In 2010 they noticed further damage and made another claim for subsidence. However this was declined as Aviva said subsidence wasn't the cause.

In 2014, following a diagnosis of subsidence at the neighbouring property, Mr B and Mrs T claimed again. This time the claim was accepted. The cause was originally determined to be some defective drains, and later a council owned plane tree on the pavement outside the property was identified as an additional cause.

Over the years that followed, Aviva carried out further investigations however little progress was made towards a resolution to the issue. In 2017 Mr B and Mrs T made a complaint about how the claim had been handled, which they subsequently brought to this service.

In 2018, this service issued an opinion on the complaint recommending Aviva appoint an independent expert to review the property and decide on the best way forward. We said that both sides should be bound by the recommendations of the expert and Aviva should fund these to resolve the claim. We also recommended Aviva pay £2,000 compensation to apologise for the poor handling of the claim. The outcome was accepted by both sides.

Following this, an independent surveyor was appointed. They recommended that the property was fully underpinned. Aviva went out to tender for the work, and tenders were received in 2021. However progress stalled shortly after this.

In March 2022 Aviva said that the council had agreed to remove the tree, so it would pursue this as a solution instead of underpinning as recommended by the surveyor. However the council faced opposition to the tree removal from local and environmental campaign groups. Subsequently protestors positioned themselves in the tree to prevent the removal. This led to an ongoing dispute in the courts between the insurers of the neighbouring property, the council and the environmental group.

Subsequently Mr B and Mrs T made a complaint about Aviva's decision to pursue tree removal rather than underpinning as a solution. They said Aviva were departing from the recommendations made by this service that it had agreed to.

Aviva didn't uphold the complaint as it said the independent surveyor had only recommended underpinning in the absence of the tree being removed. But, as the council were now in agreement to remove the tree, this fundamentally changed the circumstances. And it was now appropriate to pursue this route instead. It also raised issue with the sum insured on the policy, as it said the amount listed on the policy wouldn't be sufficient to cover underpinning work.

Unhappy with this, Mr B and Mrs T brought their complaint to this service.

Our investigator recommended the complaint be upheld. She thought Aviva should carry out underpinning to resolve the claim, rather than pursuing the tree removal. She thought this should be based on the previous scheme that was put together by the independent surveyor but updated with any additional work that may be required. And she didn't think Aviva should apply the policy limit or any remedies for underinsurance. She also thought Aviva should reimburse Mr B and Mrs T for any costs related to the claim that they owe or have paid, plus 8% interest where they have been without the funds. And she thought Aviva should pay £5,000 compensation to apologise for the distress and inconvenience it has caused since the last complaint.

Mr B and Mrs T accepted our investigator's outcome, although wanted some assurances about timescales and how Aviva would carry out the work.

Aviva didn't accept the outcome. It had the following objections:

- The surveyor had only recommended underpinning if tree removal wasn't possible, and since then the council agreed to remove the tree so it didn't agree it had acted unfairly by changing its position based on the changed circumstances.
- It said that while there are ongoing court proceedings, it is likely that these will result in the tree being removed. So it would be wrong to underpin the property when it is likely the tree will be removed in the coming months.
- It said that any underpinning would need to be done in conjunction with the neighbouring property in order to achieve a lasting result. And our investigator's recommendations didn't take this into account.
- It didn't agree that it should pay above the limit of the policy as it had agreed to increase the sum insured in line with inflation which was already generous, but the sum insured wasn't sufficient for the full underpinning of the property.
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As agreement wasn't reached, the complaint came to me to decide.

In November 2023 I issued a provisional decision on the complaint. In which I said:

***'Underinsurance and the policy limit***

*Aviva has said that it considers Mr B and Mrs T to have an insufficient sum insured for the rebuild cost of their property. It's said that any settlement would therefore only be up to the policy limit and anything more than this wouldn't be covered. It's agreed to index link the policy limit, so it is increased in line with inflation but says anything beyond that would need to be funded by Mr B and Mrs T. I don't consider this to be a fair approach in the circumstances.*

*When Aviva first inspected the property as part of the most recent claim, its loss adjuster produced a report. In this it said that it considered the sum insured to be adequate for the property at this stage. And the only reason why this now may be inadequate is because of the time it has taken to resolve the claim.*

*When assessing underinsurance, and whether a business has acted fairly by applying any remedies to reduce a claim settlement because of this, we'd first consider whether the customer had provided a reasonable estimate for the sum insured at inception and renewal.*

*Here, Aviva's loss adjuster confirmed that the sum insured was set correctly when the claim was first raised. And if the sum insured is now inadequate, it's done nothing to show that this is due to Mr B and Mrs T's actions. But instead it is due to the length of time this claim has gone on for. So I don't think it would be reasonable to reduce the settlement because of this.*

*In regards to the policy limit, I agree that the claim costs may now exceed the policy limit even once it has been index linked. However this is because the cost of rectifying the issue has increased as the issue itself has worsened. And this has happened because Aviva has failed to provide a suitable solution up until this point, after nearly ten years since the claim has been raised. It therefore wouldn't be fair for it to penalise Mr B and Mrs T for the fact it has taken such a long time to resolve.*

*I therefore agree with our investigator that Aviva should settle the claim without applying the policy limit or any remedies for underinsurance.*

### **Settlement of the claim**

*At this service, it isn't our role to decide which type of repairs would be the most effective to solve a problem of subsidence, as we don't have expertise in the structural repairs of buildings. Instead it's for us to look at the evidence provided by those that are experts, in order to determine whether the business has taken suitable steps and acted fairly, based on the evidence.*

*In 2018 this service issued an opinion recommending Aviva appoint an independent surveyor and be bound by their recommendations for a suitable solution to the subsidence issue. While a surveyor was appointed, and a scheme of works for underpinning the property was produced, Aviva later departed from these recommendations in favour of pursuing the tree removal.*

*While I understand why Aviva may have wished to explore the possibility of tree removal, I don't consider its actions here to be reasonable.*

*Firstly, it agreed to this service's recommendation to follow the direction of the independent surveyor. It then took the time to appoint the surveyor and take their scope to tender. This process took around three years in total. And if it had followed the scope produced at this time, it's likely that Mr B and Mrs T's claim would now be resolved. So based on its previous agreement to this service's recommendation, and the time taken to pursue this option, I don't think it was fair for Aviva to then change its position.*

*Further, I don't consider the amount of time that Aviva has taken in pursuing the tree removal to be reasonable. The local council didn't agree to it until March 2022 – this was already four years after Aviva agreed to this service's recommendations. And since this date, there have been further complications. With the tree removal attracting local and environmental interest that resulted in the council initially withdrawing its agreement, leading to a drawn-out process of court proceedings. This means, five years later the tree still hasn't been removed. Nor has Aviva taken any steps to resolve the subsidence issue at Mr B and Mrs T's property.*

*While I recognise the factors that have delayed the process are outside of Aviva's control, I don't consider it fair or reasonable for it to have waited such a significant amount of time for*

*the matter to conclude. In circumstances such as this, we'd expect an insurer to allow a reasonable amount of time for the third party to remove the tree, before considering other options to ensure a timely and long-lasting repair for its customer. And I think the amount of time Mr B and Mrs T have now waited far exceeds a reasonable time frame.*

*Based on this, I agree with our investigator that Aviva should now abandon pursuit of the removal of the tree and move forward with underpinning the property. As a scheme has already been put together by an independent surveyor the work should be based on this, but it should be updated based on the current condition of the property to ensure it is suitable. Mr B and Mrs T have raised questions about how and when this scheme will be undertaken. As well as requesting guarantees and certificates for the work. It isn't the role of the service to oversee budling work undertaken by the insurer. Nor would it be suitable for us to set specific timescales for different elements of the work, as this can vary depending on the outcome of investigations and progression of the subsidence. However I would expect Aviva to initiate the direction promptly following the acceptance of my final decision by Mr B and Mrs T if they choose to do so.*

*I note Aviva's point that the dispute between the third parties may soon be resolved, and this could lead to the tree removal being able to take place in the coming months. And I note that since our investigator issued her view on the case, the local council has indicated that it is now willing to remove the tree. But at this stage, I don't consider this to be enough to say Aviva should continue to wait for this action to be taken. As the amount of time that has already passed without any progress is already unreasonable.*

*I also note Aviva's comments around any schedule of underpinning needing to be completed alongside work done on the neighbouring property. I want to reassure it that this is something I have considered when reaching my outcome.*

## **Impact**

*I've also considered the impact Aviva's actions have had on Mr B and Mrs T. It's important to note that as this service considered a complaint about Aviva's actions up until 2017, I can't reconsider any issues that were part of that determination. I therefore can only look at its actions since 2017.*

*During this time, I think Aviva have caused considerable delays. And these have caused Mr B and Mrs T some significant distress and inconvenience.*

*After this service issued our outcome on the last complaint, Aviva took prompt action to move forward with the recommendations. A surveyor was appointed and up until the work went out to tender, the claim progressed how I would expect it to.*

*By August 2021 the tenders were received, so at this stage I would have expected one to be selected and work to progress on the underpinning. However instead the process was stalled while Aviva pursued the removal of the tree. It is now two years after this point and no further progress has been made.*

*This means Mr B and Mrs T have been living in their home that has a worsening subsidence issue while no progress was made towards a resolution.*

*Further, from what I've seen, after the tendering exercise, Aviva did little to keep Mr B and Mrs T updated on their proposed change of position or the direction of the claim. Which was even more distressing for them as they were left without certainty of what would happen or how long it would take. This would have been particularly distressing after having been led to believe that their home would be underpinned.*

*When this is considered in the context of an already stressful claim that had been ongoing since 2014, the distress and inconvenience Aviva caused would have had an even bigger impact on Mr B and Mrs T.*

*Further, since the appointment of the engineer, and other experts involved in putting together the scope, the contractors involved contacted Mr B and Mrs T to say that they hadn't been paid for the work carried out. And they have chased them for the money owed for the work. Aviva shouldn't have allowed this to happen as the contractors should have been paid some time ago. This has caused Mr B and Mrs T further distress.*

*Based on this I agree with our investigator's recommendation that Aviva should pay Mr B and Mrs T £5,000 compensation to apologise for the distress and inconvenience it has caused.*

*It isn't clear whether Aviva has covered the costs owed for work on the claim so far, however it should ensure that Mr B and Mrs T aren't out of pocket for the claim. It should therefore reimburse any costs paid by them and pay any outstanding amounts owed to contractors for claim related costs. For any amounts paid by Mr B and Mrs T it should add 8% simple interest to the amounts, from the date they paid them until Aviva reimburses them.*

### **Putting things right**

*For the reasons I've given, I am minded to uphold Mr B and Mrs T's complaint and direct Aviva to:*

- *Carry out underpinning of Mr B and Mrs T's property to resolve the subsidence issue rather than pursuing removal of the tree, proactively working with the neighbouring property and their insurers to achieve this.*
- *This should be based on the original scheme of work produced by the independent surveyor, updated for the property's current requirements.*
- *Settle the claim without applying any remedies in relation to underinsurance that would reduce the settlement, or applying the policy limit.*
- *Pay Mr B and Mrs T £5,000 compensation.*
- *Ensure payment is made for all claim related costs to either Mr B and Mrs T or the relevant supplier. Where reimbursing costs paid by Mr B and Mrs T it should add 8% simple interest from the date they paid for the costs until Aviva reimburses them.*

### **This service's award limit**

*Where I uphold a complaint, I can direct a financial business to take such steps in relation to a complainant as I consider just and appropriate (whether or not a court could order those steps to be taken) up to £375,000. If I think that complying with the direction leads to a payment by the business to Mr B and Mrs T or to another party for their benefit which is more than £375,000 I may recommend that the business complies with the direction in excess of £375,000.*

*Here, the outcome I have come to is for Aviva to underpin Mr B and Mrs T's property and pay compensation for distress and inconvenience.*

*If complying with my direction leads to a payment by the business to Mr B and Mrs T or to another party for their benefit which is more than £375,000, I recommend that the business complies with the direction in excess of £375,000.*

*This recommendation is not part of my determination or award. Aviva doesn't have to do what I recommend. It's unlikely that Mr B and Mrs T can accept my decision and go to court to ask for the direction to be complied with in excess of £375,000. Mr B and Mrs T may want to get independent legal advice before deciding whether to accept this decision.'*

## **Response to my provisional decision**

Mr B and Mrs T acknowledged receipt of the decision but had no further comments in relation to its contents.

Aviva responded with the following objections:

- It said I had misunderstood the circumstances around the sum insured. It said the sum insured was only deemed adequate by its loss adjuster because it matched data from a commonly used rebuild cost calculator. However this didn't take into account the complex foundations that are being proposed as a resolution of this complaint, and at the time subsidence wasn't an issue being considered. Therefore the loss adjuster didn't assess whether the sum insured was sufficient for such complex and expansive work, and if they had would have found it to be inadequate.
- It said the neighbouring property's insurers were not prepared to carry out underpinning on their property and were also pursuing removal of the tree. So, if Aviva were to enter into a scheme of underpinning work, this would be in isolation from the adjoining property. This may cause further damage to the other property which would put them at risk of legal claims from the neighbours. Therefore the only practical solution would be to await the outcome of the ongoing legal proceedings between the other insurer and the local council.
- As the court proceedings between the other insurer and the council are likely to be determined shortly, it would be more pragmatic to wait for this outcome before deciding on the case, as underpinning may become unnecessary if the tree will be removed in the coming months.

## **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've considered the points raised by Aviva in response to my provisional findings. In relation to the underinsurance, while I appreciate its loss adjuster couldn't have predicted the need for a complex underpinning solution when the claim was first raised, this doesn't change my position on how the claim should now be fairly settled.

The sum insured on a policy is usually set based on an estimated rebuild cost for the property. And as part of this process, this service expects a customer to provide a reasonable estimate for this when taking the policy out and renewing. The fact the loss adjuster agreed the sum insured was reasonable based on a commonly used industry calculator shows that the sum insured set by Mr B and Mrs T was a reasonable one. And while the loss adjuster wasn't aware of the potential costs that would result from the claim, nor would the customers have been when they agreed the sum insured. So it wouldn't be fair to penalise them for not taking this into account when setting the sum insured.

When assessing underinsurance, and whether a business has acted fairly by applying any remedies to reduce a claim settlement because of this, we'd first consider whether the customer had provided a reasonable estimate for the sum insured at inception and renewal.

Here it's clear they did. And I've not been able to identify how Mr B and Mrs T could have reasonably done anything differently to avoid the situation they now find themselves in, in relation to the sum insured.

Aviva has said that the length of time it's taken to resolve the claim is not the only reason the work required exceeds the sum insured, as underpinning would always have been an expensive option. However from what I've seen, there has been no meaningful work to mitigate the issue since the claim was first raised in 2014. And across what has now been nearly ten years, the issue will have got gradually worse. So if the matter had been properly addressed in 2014, there is little doubt it would have cost significantly less. Further, during this time the cost of labour and supplies has increased significantly. So when I consider all these factors, to limit Mr B and Mrs T's claim based on a sum insured deemed adequate at the start of the claim is neither fair nor reasonable.

I've also considered what Aviva has said about the neighbouring property. I agree it would be difficult to carry out the work required to Mr B and Mrs T's property, without working with the adjoining one. Which is why part of my direction is to ensure any work is done while working with the neighbouring property. Aviva has asked me to expand on what I said in my provisional decision about taking the neighbouring property into account in my considerations. In this decision, I am considering only what's fair and reasonable in relation to Mr B and Mrs T's claim with Aviva. And can only direct what I think it should do to resolve this complaint. It isn't for me to comment about matters relating to others who are not party to this complaint. However, due to the fact the damage has impacted both properties, I have taken consideration of the circumstances surrounding the issues at the adjoining property when reaching my findings. And, as I said in provisional assessment, I expect Aviva to work closely with the neighbours in carrying out the directions contained in this decision.

Finally, I've considered what Aviva has said about the ongoing court proceedings relating to the tree removal. I don't disagree that the dispute may soon be resolved and this could lead to the removal of the tree. But, as I said in my provisional decision, I don't think it's fair for Aviva to continue to pursue this course of action and wait for an outcome, as the amount of time that has already passed due to it pursuing this, with no progress on the claim, has already become unreasonable.

As I've said, this service would expect Aviva to allow a reasonable amount of time for the tree removal to take place before considering other options. I'd consider a reasonable time to be dependent on the circumstances, but in general around three to six months before exploring other options. But certainly, far shorter than the 22 months that has now passed. As it has already far exceeded a reasonable timeframe, I think the only fair and reasonable step is to now pursue full underpinning, regardless of any progress that is made with tree removal at this stage.

As I laid out in my provisional decision, in order to reach a fair resolution to this claim, it is important that it is now moved forward promptly, and work begins to restore Mr B and Mrs T's property. Underpinning is widely accepted as an effective and long-lasting solution to a subsidence problem and is often used where tree removal isn't possible. So I consider it a fair and reasonable solution to Mr B and Mrs T's claim, regardless of what happens through the court proceedings.

I've considered everything received from Aviva in response to my provisional decision, as well as re-considering all previous information provided by both sides. And having done so, I see no reason to depart from the outcome I came to in my provisional decision.

## **Putting things right**

For the reasons I've given, I uphold Mr B and Mrs T's complaint and direct Aviva to:

- Carry out underpinning of Mr B and Mrs T's property to resolve the subsidence issue rather than pursuing removal of the tree, proactively working with the neighbouring property to achieve this.
- The work should be based on the original scheme of work produced by the independent surveyor, updated for the property's current requirements.
- Settle the claim without applying any remedies in relation to underinsurance that would reduce the settlement, or applying the policy limit.
- Pay Mr B and Mrs T £5,000 compensation.
- Ensure payment is made for all claim related costs to either Mr B and Mrs T or the relevant supplier. Where reimbursing costs paid by Mr B and Mrs T it should add 8% simple interest from the date they paid for the costs until the date Aviva reimburses them.

## **This service's award limit**

Where I uphold a complaint, I can direct a financial business to take such steps in relation to a complainant as I consider just and appropriate (whether or not a court could order those steps to be taken) up to £375,000. If I think that complying with the direction leads to a payment by the business to Mr B and Mrs T or to another party for their benefit which is more than £375,000 I may recommend that the business complies with the direction in excess of £375,000.

Here, the outcome I have come to is for Aviva to underpin Mr B and Mrs T's property and pay compensation for distress and inconvenience.

If complying with my direction leads to a payment by the business to Mr B and Mrs T or to another party for their benefit which is more than £375,000, or if the cost of the work to be carried out exceeds this amount, I recommend that the business complies with the direction in excess of £375,000.

This recommendation is not part of my determination or award. Aviva doesn't have to do what I recommend. It's unlikely that Mr B and Mrs T can accept my decision and go to court to ask for the direction to be complied with in excess of £375,000. Mr B and Mrs T may want to get independent legal advice before deciding whether to accept this decision.

## **My final decision**

For the reasons I've given, I uphold Mr B and Mrs T's complaint and direct Aviva Insurance Limited to resolve it as laid out in the 'putting things right' section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs T to accept or reject my decision before 23 February 2024.

Sophie Goodyear  
**Ombudsman**