

The complaint

Mr R has complained on behalf of F, a limited company, about the amount Aviva Insurance Limited has offered to settle a claim made on their buildings insurance policy.

Reference to Aviva includes its representatives and agents.

What happened

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

- F took out a buildings insurance policy through an independent intermediary, who I'll call B. When the policy renewed in 2022, it was underwritten by Aviva. The policy covers a residential property, for which F is the freeholder.
- Following water damage to the property, Mr R got in touch with Aviva and it accepted the claim. Aviva said F was underinsured, so it wouldn't settle the claim in full.
- Aviva initially offered to settle the claim proportionately by applying 'average' to the buildings sum insured. At the 2022 renewal, this figure was £579,600. Aviva said it ought to have been £1,000,000 to reflect the accurate rebuild cost. It told Mr R to take advice from a surveyor, and they estimated the rebuild cost at £680,000. Aviva added VAT to that estimate and offered to pay 71% of the claim value.
- Mr R challenged this and Aviva agreed not to apply average. It later reviewed matters again and moved from the sum insured to the declared value. In 2022, this figure was £386,400. Aviva said it ought to have been £612,000. As a result, it offered to pay 63% of the claim value – which is the proportion of the actual declared value compared to what Aviva said it should have been.
- Mr R didn't think this was a fair way to settle the claim and complained. Aviva maintained it was entitled to rely on a policy term to settle the claim proportionately.
- Our investigator didn't think Aviva had acted fairly. He asked it to increase the claim settlement and pay compensation. Neither party agreed with this. And Aviva provided detailed objections to it, which I'll address in my findings below.
- As an agreement wasn't reached, the complaint has been referred to me for an ombudsman's 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.

- When considering what's fair and reasonable in the circumstances I've taken into account relevant law and regulations, regulators' rules, guidance and standards,

codes of practice and, where appropriate, what I consider to have been good industry practice at the time.

- Whilst I've read and taken into account everything said by both parties, I'll only comment on the points I think are relevant when reaching a fair outcome to this dispute. That's a reflection of the informal nature of this Service.
- I'll set out the scope of the complaint for clarity, and then move on to the points I consider to be relevant.

Scope of the complaint

- This complaint is about Aviva. As a result, I will only be able to consider how Aviva and its agents acted in relation to matters Aviva is responsible for. In summary, Aviva is responsible for the claim, including handling and settling it fairly. It is also responsible for letting B know what information B needed to gather in order for Aviva to setup and renew the policy.
- B is an independent intermediary. It is responsible for gathering the information Aviva needed in order to setup and renew the policy. That included asking relevant questions and giving appropriate guidance to F, in order to gather the right information. Aviva wasn't responsible for any of those matters, so I won't be able to consider them in this complaint. F is entitled to raise a separate complaint about B.
- It's not in dispute that the claim is covered by the policy in principle, or that Aviva is prepared to settle the claim, so I don't need to go into those points. The dispute is solely about the proportionate claim settlement, so that's what I'll focus on.

Proportionate claim settlement

- Whilst Aviva initially offered to settle the claim proportionately based on the sum insured, it later moved on to the declared value – and that was its final position.
- At the relevant time, the declared value was £386,400. Aviva says it should have been £612,000, so F is underinsured and it's entitled to rely on a policy term to settle the claim proportionately at 63%. I'll call this "the policy term". Both parties know what the term says, so I don't see a need to set it out in full – especially as it's lengthy.
- Aviva is relying on the policy term because it says the declared value is insufficient or inaccurate. The declared value was set at the 2022 renewal. So Aviva is relying on the policy term because it doesn't think F provided the right information about the declared value at the 2022 renewal – and that led F to be underinsured.
- There are laws which set out what a policyholder has to do when taking out or renewing a policy. As F is a commercial customer, the relevant law is the Insurance Act 2015 ("the Act"). In summary, the Act required F to make a 'fair presentation of the risk' at the 2022 renewal.
- If F fulfilled that requirement, the Act says Aviva has no remedy – which means it can't proportionately settle the claim. If F didn't fulfil that requirement, the Act sets out a number of specific remedies that Aviva can take.

- I recognise Aviva is only seeking to rely on the policy term to proportionately settle the claim. It's not seeking to rely on the Act, doesn't think the Act is relevant, and thinks it's incorrect for me to take the Act into account.
- In the circumstances of this case, where Aviva's concerns about underinsurance stem from the renewal, I'm satisfied it's correct to take the Act into account. Even if I'm wrong, and the Act doesn't apply, I still consider it would be fair and reasonable to take it into account. I'll explain why.
- The Act sets out what F had to do at the renewal – and what remedies Aviva has if F failed to do that. If I didn't apply the Act, I wouldn't be considering these things – I'd only be considering the policy term. That could lead to a position where F made a fair presentation of the risk, and fulfilled its duty under the Act, but nonetheless loses out as a result of the information it gave within that fair presentation. I'm not persuaded such a situation would treat F fairly and reasonably.
- There are circumstances in which Aviva may not be limited to the specific remedies of the Act. And Aviva says the Act doesn't prevent it from relying on the policy term in any case. I'll set out my understanding of the Act in relation to those two points.
- The Act includes a 'contracting out' section. In summary, it says that a term of a policy that would put the commercial customer in a worse position in relation to parts 2, 3, or 4 of the Act would have no effect unless certain 'transparency requirements' are met. Part 2 is the section of the Act concerned with the duty of fair presentation. And it includes the circumstances in which remedies are available to an insurer should that duty not be met.
- In this case, Aviva says F ought to have set the declared value at £612,000. But it was only set to £386,400, or around 63% of the amount it should have been. Aviva says the policy term means it can therefore settle the claim proportionately at 63%.
- The Act says *if* a policyholder breaches the duty of fair presentation, and it a wasn't reckless or deliberate breach, the insurer may reduce proportionately the amount to be paid on a claim. And that proportion is the amount of premium paid, compared to the premium that would have been paid had the duty of fair presentation been met. Aviva hasn't suggested F acted recklessly in relation to the declared value and/or deliberately gave a declared value it knew to be insufficient. So *even if* there were a breach, I don't think there's any suggestion it was reckless or deliberate.
- Our investigator asked Aviva what premium it would have charged if the declared value had been set to £612,000 as Aviva said it should have been. Based on Aviva's response, the proportionate reduction in line with the Act is around 70%. But under the policy term it reduced the claim to 63%. As a result, I'm satisfied the policy term puts F in a worse position than the Act, and in relation to Part 2.
- In my view, that means unless Aviva met the transparency requirements in this case, the Act makes clear that the policy term is of no effect in this case. Aviva hasn't sought to argue that it met the transparency requirements or otherwise 'contract out' of the Act. And I've seen no evidence to suggest it took the relevant steps to do so. Accordingly, I'm satisfied that in this particular case, the policy term is of no effect under the Act – and therefore can't be applied. That means it was unfair for Aviva to seek to reduce the claim settlement to 63%.

- The position may be different in other cases, so my finding isn't that the policy term is *always* disadvantageous. My finding is only that the policy term is disadvantageous *in this particular case*.
- The Act also makes clear that Aviva only has a remedy, such as reducing the claim settlement to 70%, *if* F breached the duty of fair presentation. The onus is on Aviva to show such a breach occurred.
- So, I'll consider whether Aviva has shown F fulfilled the requirement to make a 'fair presentation of the risk' at the 2022 renewal, in relation to the declared value.

Information given at renewal

- When the policy renewed, Aviva wanted to know what declared value to set. In principle, Aviva was entitled to ask B to gather that information from F and to make a decision about what premium to charge, what policy terms to set – and even whether to offer the policy at all – based on the response it received.
- Through B, F set the declared value at £386,400. Aviva said it should have been £612,000, so that's effectively why Aviva didn't consider F had made a fair presentation. The higher figure is the surveyor's estimate of the rebuild cost, from which Aviva has deducted 10%. I understand from this that Aviva considers the declared value should be based on, or closely related to, the rebuild cost.
- Aviva hasn't shown what it asked B to gather about the declared value. It says B ought to have known what the declared value should represent, as this is a matter of common knowledge in the industry and B had certain duties of its own to F.
- I agree in principle that B had a responsibility to F as a professional independent intermediary. And, in that capacity, B should have a much greater level of insurance knowledge and understanding than F. As a result, the extent to which Aviva needed to highlight or explain what it wanted the declared value to represent is much lower for B than if the policy was sold directly to F. Nonetheless, I would still expect Aviva to take reasonable steps to ensure B knew what information to gather about the declared value. Whilst those steps may be minimal, given the capacity B was acting in, I haven't seen evidence to show *any* steps were taken. Or that B should otherwise have known what declared value meant to Aviva.
- So the only information available to me to show what B could have reasonably understood what Aviva wanted to know about the declared value is the policy booklet. The policy has a definitions section, but this doesn't include a definition for the phrase 'declared value'.
- The only part of the policy which gives a meaning to the phrase is within the 'property damage – clauses' section and the 'day one basis of settlement' sub-section. In summary, it says 'declared value' means F's assessment of the cost of reinstatement of the property arrived at in accordance with a paragraph in another section. That paragraph set out how Aviva will settle claims. If the property is lost or destroyed, Aviva will pay for it to be rebuilt or replaced on a new for old basis. Or, if the property is damaged, Aviva will pay for it to be replaced or repaired on a new for old basis.
- I'm not persuaded that clearly explains Aviva would like the declared value to be based on, or closely related to, the rebuild cost. One *could* infer that, because Aviva would pay for destroyed property to be rebuilt as new, the reinstatement cost of the

property ought to cover that cost. Even if one did, the reinstatement cost is at F's assessment – so the declared value seems to be based on F's estimate of the rebuild cost, or a figure closely related to it.

- So, even if I thought Aviva had clearly set out that the declared value should be based on, or closely related to, the rebuild cost, the estimate of that rebuild cost would be at F's assessment. I would then have to go on to consider whether Aviva has shown F failed to make a fair presentation based on that.
- Amongst other things, the Act says a fair presentation is one in which every material representation as to a matter of expectation or belief is made in good faith. I consider estimating a rebuild cost is a matter of expectation or belief, rather than a matter of fact, as there's no one single answer that's 'correct' for a rebuild cost. If a number of builders were asked to estimate a rebuild cost, it's unlikely any two would be exactly the same.
- So, to make a fair presentation, Mr R, on behalf of F, had to act in good faith when estimating the rebuild cost. In my view, that means taking reasonable steps to reach a figure likely to be within a reasonable range of estimates, based on the information that was, or ought to have been, available to him. I don't think that means he was obliged to take professional advice – and I haven't seen evidence to suggest Aviva set out that requirement as part of the sale or renewal. In these circumstances, I would have expected Aviva to have explored how F reached that rebuild estimate, including what information was available to it at the time of the presentation.
- Aviva seems to have been content to rely on the surveyor's estimate of the rebuild cost. But that estimate was produced after the presentation, so it wasn't available to F at the time of the presentation. And it wasn't F's assessment, as Aviva required.
- Overall, this means I'm not satisfied Aviva has shown F breached its duty to make a fair presentation. That's because it's not entirely clear what the declared value should represent. And, even if I thought it clearly represented the rebuild cost as Aviva says it does, Aviva hasn't shown F's estimate was inaccurate – particularly given Aviva required the estimate to be based on F's assessment. The Act is clear that Aviva has no remedy in these circumstances, so it can't reduce the claim settlement.
- I'm also not satisfied Aviva has shown it was entitled to act outside of, or contrary to, the Act and rely on the policy term to reduce the claim settlement. Doing so would put F in a worse position than the Act and I don't think that would be in line with the law or fair and reasonable, even noting that Aviva hasn't sought to rely on or involve the Act – and it doesn't think the Act applies.

Putting things right

- Aviva hasn't persuaded me it would be in line with the relevant law – or fair and reasonable – to reduce the claim settlement for alleged underinsurance. So, to put things right, it should settle the claim without relying on the policy term. It may still make other deductions supported by other policy terms, for example the policy excess and/or relevant policy limits.
- I understand Aviva has already paid an amount toward the claim, based on its offer to settle at 63%. That payment can be deducted from the settlement and an additional amount paid to cover the remainder. That additional payment should have interest added as F has unfairly been without that money. I think it would be fair to

add interest from the date the 63% payment was made, as the claim should have been settled fairly at that time. I understand that was 3 April 2023.

Professional fees

- Aviva required Mr R to take professional advice about the rebuild cost and then relied on the advice when offering to settle the claim. So I think the advice played a key role in the claim for Aviva. And, for the reasons given above, I'm not satisfied Mr R should have been required to take this professional advice anyway.
- Aviva has now agreed it should reimburse Mr R the cost, plus interest, so I don't think it's in dispute any longer. He paid £1,140, so that's what I'll require Aviva to reimburse, although it's entitled to evidence of the cost and payment if it wishes.

Compensation

- Our investigator asked Aviva to pay £250 compensation for the inconvenience caused to F by the way the claim was handled. I don't think either party disputes this is a reasonable amount in the circumstances. And I'm satisfied it is, given the delay and additional input required of Mr R, on behalf of F, to have the claim settled fairly.

My final decision

I uphold this complaint.

I require Aviva Insurance Limited to:

- Settle the buildings claim without a deduction for underinsurance by making an additional payment*.
- *To that payment, add interest at 8% simple per annum, from 3 April 2023 to the date of settlement.
- Pay £1,140 for the surveyor's fees**.
- **To that payment, add interest at 8% simple per annum, from the date of payment to the date of settlement.
- Pay £250 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask F to accept or reject my decision before 5 November 2024.

James Neville
Ombudsman