

## **The complaint**

A company, which I'll refer to as O, complains that Aviva Insurance Limited rejected a claim on its buildings insurance policy and refused to renew the policy. Mr B, who is a director of O, brings the complaint on O's behalf.

Where I refer to Aviva Insurance Limited, this includes its agents and claims handlers acting on its behalf.

## **What happened**

O is a limited company through which four people own the freehold of the building where they each own the leasehold of a flat. O took out buildings insurance with Aviva in January 2022.

In November 2022 O made a claim on the policy after cracks were seen, which Mr B says were thought likely to have been due to movement in the building as a result of the very hot weather that summer.

O obtained a report from a structural engineer which said the cracks were likely due to subsidence caused by nearby trees.

Aviva rejected the claim, saying the cracks had already been present before the policy started. It decided not to renew the policy in January 2023 on the basis O should have disclosed the cracks when buying the policy.

O complained but Aviva didn't change its decisions so Mr B referred the complaint to this Service.

While the complaint was with us, O obtained a further engineer's report in December 2023, which said

- the cracks didn't appear to be any worse;
- they were likely due to a number of causes rather than one single cause, including thermal movement; insufficient infill in the porch area; or possible subsidence caused by damaged drains or by trees
- once the cause was confirmed, repairs could be started.

Our investigator thought the complaint should be upheld. She said

- Aviva declined the claim on the basis there was no subsidence before reviewing the engineer's report O had obtained or two previous surveys, and without carrying out any further investigation, which should have been done.
- But after reviewing the recent report, Aviva had agreed to reopen the claim and carry out monitoring to establish the cause of the problem, which was reasonable. So it didn't need to do more about the claim.

- The property is residential and so it's fair to refer to the ABI guidance on continuing cover after a subsidence claim. Since there should have been an ongoing claim at the time of renewal, the policy should have been renewed in line with the guidance.
- To put things right, Aviva should provide ongoing subsidence cover from the renewal in January 2023 and compensate C for the additional cost of the more expensive policy it had to get.

Mr B accepted the recommendations, though he was concerned about what Aviva might charge for the subsidence cover. He also said Aviva hadn't been in contact about the monitoring. And he said if the resolution wasn't confirmed, he might wish to seek compensation.

Our investigator explained that as the complaint is from O, rather than Mr B personally, she wouldn't be able to recommend compensation for him.

Aviva didn't accept the recommendations. It said the ABI guidance doesn't mean it had to renew the policy and there was no new information that would change its decision not to renew it.

The investigator considered Aviva's comments but didn't change her view. She said Aviva refused to renew the policy on the basis it wasn't told about cracks which were present before the policy was taken out. But it hadn't provided evidence showing the damage was pre-existing, or that this meant the risk was no longer acceptable.

Aviva has requested an ombudsman's decision. Amongst other things, Aviva says:

- cracks were present in 2017, well before the policy started
- this should have been declared but wasn't
- if it had been declared, the underwriters would not have offered subsidence cover.

Before proceeding with my decision, I explained to both parties that in broad terms I agreed with the investigator that the fair way to resolve the complaint would be for Aviva to provide subsidence cover, subject to whatever premium would have been charged for that being paid. So I intended to uphold the complaint but give specific directions setting out the arrangements for ongoing cover. I invited comments on these.

Aviva provided further comments, which were broadly a repeat of its reasons for not renewing the policy on the basis the cracks had been present since before the policy started.

Mr B raised some issues about the monitoring now being carried out and said he would like to know if Aviva's proposed premiums are reasonable.

I explained that my decision will only address the issues raised in this complaint. The claim has been accepted and any concerns about more recent events relating to that would need to be dealt with as a fresh complaint. Mr B acknowledged this and said he would make a fresh complaint if necessary.

### **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 Mr B submitted the complaint on O's behalf, the claim had been rejected. Aviva has since agreed to look into the claim and arrange for monitoring to establish the cause of the problem. Given the uncertainty about the cause of the damage, monitoring to establish the

cause is reasonable and in line with common practice.

As that's now being dealt with I don't need to make a decision on that. If there are any issues about how the claim is dealt with going forward, Mr B may make a fresh complaint on O's behalf about that.

The issue I need to determine is whether it was fair for Aviva to say it would not renew the policy.

It's for insurers to decide what risks they want to accept when deciding whether to offer a policy. So the starting point is that this is a decision for Aviva to make. But I can consider whether an insurer has treated its customer fairly. When deciding that, I take into account relevant law, regulators' rules, guidance, codes of practice and (where appropriate) what I consider to have been good industry practice at the time

In this context, I've considered the ABI guidance on continuation of cover following a subsidence claim. This says where a subsidence claim has been made, the insurer should normally continue to provide subsidence cover after the repair has been carried out.

The guidance applies to domestic properties owned and occupied in a personal capacity. Aviva says this is a commercial policy. Although O is a limited company, it's simply a way for the four flat owners to own the freehold of the building. The four flats are all occupied (two by owners and two by tenants). The key here is that the property is used for living in, so it's a domestic property in nature. And the purpose of the ABI guidance is to ensure homeowners can get insurance cover after a subsidence claim.

In this case, the owners (through O) couldn't renew the policy with Aviva. And although they got insurance elsewhere, it was more expensive than their previous policy and they couldn't get cover for subsidence.

I appreciate the guidance doesn't guarantee that cover will always be provided. But the guidance says insurers should comply with the "spirit" of the guidance where possible.

In these circumstances I don't consider it fair that O wasn't able to get subsidence cover. If Aviva hadn't rejected the claim initially, without investigating it further, the claim would have been ongoing when the policy renewed. And to comply with the spirit of the guidance, Aviva would have needed to offer subsidence cover. This is consistent with longstanding good industry practice.

Aviva has referred to a decision by this Service on another complaint. We look at every case on its individual circumstances. The circumstances of the other case were quite different and the ABI guidance wasn't a relevant consideration there. It doesn't affect my judgment on the circumstances of this case.

Aviva says it wouldn't renew the policy because the cracks were already present when O bought the policy and should have been disclosed. And it says if it had been told about the cracks it would not have offered the insurance.

Effectively what Aviva is saying is that there was a misrepresentation at the sale of the policy. For a commercial policy, strictly speaking the relevant law is the Insurance Act 2015. That requires a policyholder to make a fair presentation of risk to the insurer. I don't think it would be fair to apply that strictly in the circumstances of this case. O isn't a trading company and the policy is domestic in nature; it's home insurance for four residential flats. So I've thought about the fair way to consider what O should have done when buying the policy.

O was asked to confirm certain details, including that the building *“is and will be maintained in a good state of repair”* and *“has not suffered from nor is showing any signs of damage by subsidence, landslip or ground heave”*.

Looking at the information available at the time, as far as Mr B and the other owners were aware the building was in good repair. Although there had been some cracking, reports prepared previously said these were cosmetic only, not structural, and there was no evidence of subsidence. In those circumstances I think it was reasonable to have confirmed the statements about the condition of the property.

For these reasons, I don’t consider it was fair not to renew the policy.

Where someone has lost out as a result of an error my aim is to try, as far as possible, to put them in the position they would have been in, if the error had not happened. In this case, O would still have had subsidence cover. So the fair way to resolve the complaint is for Aviva to provide subsidence cover, subject to O paying whatever premium would have been charged for that.

The intention of the ABI guidance is to ensure policyholders can continue to access subsidence cover – and that includes setting premiums at a reasonable level. So whilst Aviva is entitled to take into account the circumstances of the claim when calculating a premium, it should also take into account the spirit of the guidance.

If O is unhappy about any additional premium charged, it may raise that as a fresh complaint.

At the next renewal, Aviva may wish to offer full buildings cover, including subsidence, so both parties can return to a normal arrangement (rather than the cover being split between Aviva and another insurer, which it effectively will be for this policy year).

In addition, the insurance O obtained elsewhere was more expensive. I don’t know what Aviva would have charged if it had renewed the policy. But it should calculate what that would have been and, if it would have been less than the amount O has paid, it should reimburse the difference. O should not be out of pocket as a result of what happened.

### **Putting things right**

Subject to O paying any premium due for ongoing subsidence cover, Aviva should

- provide ongoing subsidence cover from when renewal was refused until the next renewal and then review, bearing in mind the ABI guidance, unless at renewal subsidence has been ruled out as the cause of the damage;
- continue this at each subsequent renewal unless by that point subsidence has been ruled out as the cause of the damage; and
- pay the difference in cost between the policy that was provided to O by an alternative insurer and the policy that would have been provided by Aviva, if it had not refused cover.

### **My final decision**

My final decision is that I uphold the complaint and direct Aviva Insurance Limited to take the steps and pay the compensation set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask O to accept or reject my decision before 19 August 2024.

Peter Whiteley  
**Ombudsman**