

complaint

The complaint concerns Aviva Insurance Limited's rejection of Mrs S' claim under her home insurance policy. Mrs S made the claim to Aviva in February 2018 after water flooded her basement.

background

Aviva said the damage couldn't be considered under storm or flood because no weather events were recorded in the area around the time of the loss. It considered if damage was caused from a leaking pipe, but said no water was escaping from the supply in Mrs S' home, or the immediate vicinity. Aviva said damage to the property was only evident after a period of heavy rainfall which suggests a high-water table problem. It said the claim would be considered under accidental damage. But it pointed out that this section of the home insurance policy excluded anything that happens gradually, and damage caused by water entering the home regardless of how this happened.

Aviva explained that its findings indicated the damage was due to the high-water table in the area and a failed tanking system. But it said many issues could be contributing, including the construction of the basement and the design of the waterproofing system.

Our investigator expressed the opinion that Mrs S' claim should be covered under the policy peril of flood. She felt that water had built up in the basement and pooled across the wall, by the skirting board. She noted there had been no problem with the basement for some time and it had been watertight. So, she wasn't persuaded the damage was due to failed tanking.

Aviva initially agreed with our findings and our investigator passed this news on to Mrs S. But then Aviva said it wanted the complaint to be passed to an ombudsman. It said it was concerned no consideration had been given to the construction of the basement and the design and installation of the waterproofing system. Aviva said these were critical to its decision. It considers that the existing water proofing system has not been designed and installed correctly.

I issued a provisional decision on 4 September 2019. In this I said;

'I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Where the evidence is incomplete or in dispute, as some of it is here, I need to reach my decision on the balance of probabilities – that is, what I consider is most likely to have happened in light of the evidence that is available and the wider surrounding circumstances.

Mrs S' policy doesn't define the word "flood". We take the view that a flood does not have to be a sudden or violent event; water building up slowly and steadily can constitute a flood. And water entering the property through the floor or the walls (as reported by Mrs S when she registered the claim) can also constitute an incident of flooding. The key factor is that water has built up, regardless of where it came from.

On balance, in the particular circumstances of this claim and based on the evidence I've seen, I am satisfied that water did build up. Aviva's claim report form refers to "water oozing up" and water "puddling". And the photos appear to show water marks on the wall and skirting board. So I agree with our investigator that the claim should be dealt with by Aviva under the policy peril of flood, not accidental damage as it had previously suggested.

Aviva says the construction of the basement and the design and installation of the waterproofing system are critical to its decision on the claim. Yet in my opinion, it doesn't necessarily come across like that in its final response to the complaint. Aviva refers to "many other issues" that "could be" contributing. Were it so critical, I would have expected these issues to be at the forefront of Aviva's investigation of the claim (and indeed, a similar claim Mrs S made back in 2012).

I have reviewed all of the professional opinion on file. I'll abbreviate the name of the companies because we publish final decisions on our website. I believe Mrs S provided information from companies R, Pre and Pro. Aviva commissioned a report from company S. And there are investigation notes on file from company B. I'll summarise some of the information in these reports:

Company R's quotation 9 February 2018 – its thoughts were the cause of the water ingress into the basement were likely as a result of freeze thaw cycles which caused damage to the external waterproofing membrane.

Company B, 27 February 2018 – it said "given the age of the extension to the property it is fair to assume that all required DPM's (Damp Proof Membranes) are in place. Information received would suggest that the basement was built to current construction codes and NHBC, however at this time we have no access to the construction plans". Company B concluded that "there is a breach to any DPM/DPC allowing clean water to enter the property through the lower walls or floor".

Pre letter 2 March 2018 – gave a brief synopsis of its thoughts, including the waterproofing system for the basement. It acknowledged there were no technical drawings available to show the construction details or waterproofing details for the basement. However, it gave its thoughts on how the basement may have been waterproofed and described it as "normal practice". Pre said "given the fact that an external waterproofing was installed some years ago and has only recently leaked, it seems likely that some form of change in external ground water conditions may have occurred to cause this".

Pro letter 7 March 2018 – said "given my experience with ICF built structures and the fact the building's basement has been free from water ingress until fairly recently I am of the opinion water ingress is due to defects in the external waterproofing system with such brought about by recent adverse weather conditions, a rise in the localities water table and as a bi product of a continual freeze thaw process".

Company S report 4 May 2018 – said "Mrs S has confirmed during our survey that the original basement build was an ICF construction and that the adjoining area below the decking which she confirmed as a reinforced concrete construction was added just after. She has no drawings or written design available to present to us. We therefore do not know what waterproofing treatment was applied to the structure's walls and floor or to the decking where the structure extends beyond the above ground floor footprint". It continued, "Mrs S told me during the survey that this was the first and only time there was an issue with the ICF construction's degree of water tightness although a sump and some waterproofing treatment had been installed to the adjoining room situated to under the decking area in 2012".

Company S said "according to information available in the public domain on the planning portal the basement build is to be used as a non-habitable space and as storage only.

Because it is designed as storage and because we have no knowledge of the initial design we can't assume that the waterproofing installation has been carried out to BS8102 grade 3, i.e. a habitable environment as defined on table 2 of BS8102. It could have been designed and installed to a grade 1 or grade 2 environment for storage or plant which allows some seepage or tolerates some water vapour". It then offered some scenarios as to why some seepage had occurred. This included that there may not be a sufficient barrier of defence against groundwater.

Company S referred to the "relative location of the internal seepage" and made the assumption that the light well voids could have been "overwhelmed by a deluge of groundwater". It also reported the side basement area under the decking "was found to be very damp and any existing waterproofing system to this area is likely to have been breached and failed".

So we have various opinions from the companies representatives, based on their experience and knowledge. What we do know is that the basement was watertight before and had been since 2012. As I understand it, the property construction was completed around 2009/2010. Given this, I am persuaded that the basement was water proofed, although the design of the system is not clear.

Aviva believes the water proofing system may not have been designed and installed correctly. There's no definitive evidence of that. And Aviva hasn't supplied us with information from the planning portal, referred to by Company S. We weren't able to locate this information on the planning portal. However, I do acknowledge Aviva's point that there have been two failures to the basement since the property construction was completed.

Despite this, I am persuaded that Mrs S still has a legitimate claim for flood. That's because there is no exclusion under storm or flood for faulty design. There is under accidental damage, but this is not an accidental damage claim. And I can't see, from the copy of the policy booklet supplied to us by Aviva, that faulty design is a general exclusion under the policy.

In addition, Aviva accepted the 2012 claim. It's not clear if it followed up the issue of the construction of the basement and the design and installation of the waterproofing system back then. If the matter was so critical to Aviva, I would have expected it to fully investigate this on the earlier claim.

I don't believe Aviva has sufficient grounds to deny this claim. Generally the professional opinion seems to be that the existing waterproofing was breached and overwhelmed by the volume of water. On balance, I believe there was a change in the ground water conditions. And this build-up of water caused damage to Mrs S' property.

This means Aviva will need to settle Mrs S' claim in accordance with the policy terms – "Settling buildings claims" and "Settling contents claims". And Aviva will know it should put Mrs S back in the position she was in before the insured event took place. Any repair that it may undertake on the buildings claim should be lasting and effective. The repairs may need to include waterproofing of the basement if Aviva believes the basement might flood again, after a short period of time, or on a regular basis. I realise this does not fall within the cover provided by the policy. But Aviva will not have met its obligations under the terms of the policy if it carries out or pays for a repair that is ineffective and doesn't last very long. So this must form part of Aviva's consideration when it settles the claim.

My provisional decision is that I am minded to uphold this complaint about Aviva Insurance Limited and direct it to settle Mrs S' flood claim.

If this results in a cash settlement this should include interest at a rate of 8% simple interest from the date of the claim. And if Aviva Insurance Limited considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mrs S how much it has taken off. It should also give Mrs S a certificate showing this if she asks for one, so she can reclaim the tax from HM Revenue & Customs, if appropriate.

I make no other award against Aviva Insurance Limited.'

In response to my provisional decision, in summary, Aviva said;

- Company R and company Pro referred to a freeze thaw process causing the water ingress in the basement. The damage would be excluded because frost damage isn't covered under the storm or flood peril. It would also be excluded under the General Conditions section of the policy wording as wear and tear or damage which happens gradually over time aren't covered.
- Planning permission for the basement was not granted until April 2009 and it believes the construction was completed sometime during 2011. The first failure to the basement occurred in April 2012.
- During its investigations Aviva identified there were issues with the planning and construction of the property. When planning approval was given, this included the basement for use as a storage area and it was not granted for habitable space usage.
- It fails to understand why it should install an internal waterproofing system which complies with BS8102 grade 3, when this was not installed to the property when built.
- It agreed to accept the damage to the internal finishes as part of the claim. Aviva said that, in order to facilitate the repairs, the damaged internal finishes would need to be stripped and at this point it proposed to undertake further investigations in order to determine what waterproofing system was originally installed and the cause of the failure. Once its investigations are complete and it knows the exact cause of the damage, it will issue a cash settlement for its policy liabilities.

In response to my provisional decision, in summary, Mrs S;

- Sent us a copy of an email from her local council which said the excavation and basement site inspection were carried out and there were no noted defects at the time. Mrs S said as far as the council was concerned the proper tanking and waterproofing had been carried out and the next stage of the build was approved.
- Said she'd had the strip out works completed to the internal finishes. The company that inspected the construction noted it was impossible to determine what waterproofing was originally installed and the only way to ensure this incident would not happen again was to install an internal water proofing system.
- Believes that Aviva are just repeating everything that has already been addressed.

- Said she'd had no alternative but to get the repairs done given the situation with her family, including existing medical conditions, which were exacerbated by the way Aviva had left her property. Mrs S said she felt very let down by Aviva and the matter has been extremely stressful.
- Sent us photos of the condition of her home.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I've reached the same conclusions set out in my provisional decision and for the same reasons.

It is my view, from the professional opinion I've seen, it is most likely there was a change in the ground water conditions (a rise in the water table) and this build-up of water caused damage to Mrs S' property. Indeed, I note from the initial water mitigation inspection, Aviva's loss adjuster said the source of the water was "*flooding due to increased saturation to the water table in the area*". So, I am satisfied the insured peril to be applied in this case is flood, because there was a build-up of water. I am not persuaded Mrs S' basement was damaged as a result of frost. Therefore, that policy exclusion, under the storm and flood peril, would not apply.

I don't accept Aviva's suggestion the claim would be excluded under the General Conditions section of the policy. That section of the cover says, "*your policy is intended to cover you against unforeseen events like fire or theft. It does not cover wear and tear or damage which happens gradually over a period of time*". The flood was an unforeseen event. The water appears to have entered the property at floor level. So, it's not unreasonable this may have gone unnoticed until water began to ooze up and puddle around the skirting board. In these circumstances, it wouldn't be fair to apply an exclusion for gradual damage. And wear and tear are damage that naturally and inevitably occur as a result of normal wear or aging. But the damage to Mrs S' basement was not down to normal wear or aging.

I acknowledge the points both parties have made concerning the construction and waterproofing of the basement. Yet there is still no definitive evidence of the nature of the water proofing system originally used in the basement. And there's no exclusion for defective design anyway, in the insurance policy, under the storm or flood peril. So, Aviva hasn't done enough now to deny the claim. I also maintain if the construction and waterproofing of the basement was so important to Aviva, they should have been fully investigated as part of the 2012 claim and been more prominent in its final response to this complaint.

It is disappointing to note that Aviva supplied us with *new* evidence on this case (for example, from the planning portal) at a very late stage and after the provisional decision had been issued. We specifically asked Aviva back in August 2019 if it had such information to give us. It said, "*we have sent you all the info we have re this case (sic)*".

Despite this and the other points Aviva made in response to the provisional decision, it has agreed to accept the damage to the internal finishes in Mrs S' basement as part of the claim. I believe that's the right way forward. We've let Mrs S know. Mrs S will need to supply Aviva with invoices and receipts for the work she's had done, in order that it can determine the extent of its liability under the policy.

I should clarify that I have not directly instructed Aviva to install an internal waterproofing system which complies with BS8102 grade 3. In my provisional decision I said that any repair that is undertaken should be effective and last and Aviva would need to consider this and the issue of waterproofing when it settles the claim.

The basement was watertight between 2012 and 2018. Mrs S indicated resin injection treatment was undertaken on the 2012 claim. Aviva will need to consider what would constitute an effective repair on this claim and settle the matter accordingly.

my final decision

My final decision is that I uphold this complaint about Aviva Insurance Limited and I direct it to settle Mrs S' flood claim in accordance with the terms and conditions of her home insurance policy.

If this results in a cash settlement this should include interest at a rate of 8% simple interest from the date of the claim, until settlement of the claim. And if Aviva Insurance Limited considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mrs S how much it has taken off. It should also give Mrs S a certificate showing this if she asks for one, so she can reclaim the tax from HM Revenue & Customs, if appropriate.

I make no other award against Aviva Insurance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 29 December 2019.

Paul Phillips
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