

complaint

Mrs T is unhappy with the way Aviva Insurance Limited has handled her claim for subsidence and subsequent repairs.

For ease, any reference to Aviva also include its agents.

background

Some years ago, Mrs T logged a claim for subsidence which was thought to be initially resolved but later reoccurred in around 2010. Aviva believed the damage was being caused by tree roots and other vegetation close by and arranged for these to be removed. In early 2019 this service considered a complaint about delays and an investigator recommended that further monitoring took place to see if the property was stable and then for the works to be completed.

Following more monitoring, Aviva told Mrs T that her property was now stable, except for seasonal movement which it said was within acceptable levels. But it also told her that it had recently found the foundations on the kitchen extension to the property were too shallow and it was considered a defective design – which isn't covered by the policy. Aviva went on to say it believed that if the foundations had been built to the correct depth it would have prevented the subsidence from happening. As a result, Aviva said it would pay for the superstructure repairs as a gesture of goodwill but that it wouldn't arrange for the problem with the foundations to be rectified as it considered this to be betterment. It also informed Mrs T that the cracks in the main building were not subsidence related and so these wouldn't be included in this repair.

Unhappy with this response Mrs T brought a further complaint to this service. She said Aviva insured her whole property and so it should repair the cracks in the main house too. And as the monitoring reports still showed that there was movement, she didn't think the extension repairs should be completed without doing any works to the foundations as the property wasn't stable. Our investigator looked into the matter and found that Aviva wasn't unreasonable in declining to cover the repairs to the main house as it had provided an expert report to show this was likely due to construction, rather than subsidence. So, she said that Aviva didn't have to complete the repairs on the main building.

In relation to the kitchen extension, our investigator said that as there was still some movement showing on the monitoring reports, she didn't think that a lasting and effective repair could be achieved at this time. She said it wasn't reasonable for Aviva to complete the repairs whilst movement was still being detected.

Our investigator also looked into the matter regarding the foundations. She found that the building guidelines Aviva referred to weren't requirements that had to be followed on the extension - as these related to new build properties. And Aviva hadn't shown that the Building Regulations that were in force at the time, which the build of the extension would have been subject to, hadn't been followed so didn't think it was reasonable to say that the damage had occurred as a result of a faulty design or poor workmanship. She recommended that Aviva complete all of the works necessary to ensure the property was stable before completing the superstructure repairs. In addition, she said that Aviva should pay £150 to Mrs T in recognition of the distress and worry caused to her when it determined it could complete the substructure repairs when there was still evidence of movement.

Mrs T accepted our investigator's view, but Aviva didn't. It maintained that the property was stable – with the only movement being seasonal and within acceptable tolerances. It didn't agree that it needed to do any work to the foundations and that the superstructure repairs were all that were necessary to resolve this current issue. But it also reiterated that the foundations didn't meet the relevant Building Regulations as it said these required the structure to be designed so that subsidence damage due to soil shrinkage or swelling didn't occur. And that, as the damage occurred as a result of such conditions, it therefore follows that the regulations weren't met. Aviva also said that the builders would have had a duty to build the extension to an appropriate standard and any building professional at the time would confirm that the building guidelines it had referred to provided that standard. It maintained that the exclusion relating to faulty workmanship and defective design would apply and it would only provide cover for the superstructure repairs to the extension as a gesture of goodwill.

As no agreement could be reached, the complaint was passed to me to decide.

On 2 February 2021, I issued my provisional decision. In it I said;

When this complaint was made to our service there were two distinct areas of concern; the main house and the extension. Our investigator said she didn't think that the main house was suffering from subsidence or any other insured peril and therefore Aviva's decision not to provide cover for this damage was reasonable. I'm aware Mrs T has accepted our investigator's view and so I won't be looking into this aspect in my response.

There doesn't appear to be any dispute that Mrs T's extension has previously suffered from subsidence which related to trees and vegetation nearby. I'm aware that there has been a number of complaints made to this service in recent years, however, this complaint centres on two aspects; whether Mrs T's extension can be considered as stable, based on the monitoring reports, and if Aviva's decision to not complete repairs on the extension foundations for this reason, along with its reliance on the exclusion on the policy relating to defective design is fair and reasonable.

In deciding this sort of question, I generally rely on expert opinion. The only expert opinion in this complaint has been provided by Aviva's engineer. He has said that he doesn't accept that the property is currently subsiding or moving. He has reported that the "...levelling exercise from April 2019 to January 2020 has shown negligible movement (less than 2mm level difference) ...I would consider level movement of up to 10mm to be related to common seasonal movements. Level readings are well within this tolerance."

There has also been monitoring of the cracks inside Mrs T's property. Aviva's engineer has reported that the crack damage is less than 5mm wide and is easily repairable. Over the same period of monitoring as before, he has said that the five monitoring stations have, on the whole, shown negligible movements of less than 0.5mm. He has referred to one crack showing closure of up to 1mm and, where one crack has shown movement of up to 2.5mm he has said he thinks this "is either due to a miss-reading or thermal/shrinkage movement". The engineer has stated that he believes only superstructure repairs are required to the kitchen extension.

I've thought about this carefully. I accept Mrs T's view that there is still movement, but the engineer has explained that this is seasonal and within acceptable tolerances. He has referred to a technical guide on subsidence damage which states "some small seasonal movements are inevitable, and movements of a few millimetres will have no more effect on

the property than normal thermal expansion and contraction.” And without any other expert advice to the contrary, I’m persuaded that the movement shown is within normal levels and therefore Aviva’s plan to complete the superstructure repairs only (i.e. the cracks in the extension) is reasonable. The identified cause of the movement (the vegetation) has been removed and a subsequent period of monitoring has shown no further movement, so the evidence suggests Aviva has stabilised the property.

Aviva has only agreed to pay for the superstructure repairs as a gesture of goodwill as it says that the foundations on the extension didn’t meet the Building Regulations and guidelines that applied when it was built. It says the foundations are therefore a defective design which is excluded under the policy. Where an insurer seeks to rely on a policy exclusion the onus is on it to show that the exclusion applies. Aviva has referred to standards applied by a certain builder of new homes which were in force from 1974 – I understand Mrs T’s extension was built around 1982. It says these guidelines recommend a minimum foundation depth of 1500mm, when considering the nearby trees. Following excavations at Mrs T’s property, the foundations of the extension appear to be in the region of 450mm to 600mm which is approximately one third of the depth of the guidelines.

Mrs T’s extension isn’t subject to these guidelines for new homes and only general Building Regulations would apply – the one valid at the time of the construction of the extension doesn’t stipulate the actual depth required but simply states;

The foundations of a building shall:

b) be taken down to such a depth...as to safeguard the building against damage by swelling, shrinking...

Aviva has argued that the Building Regulations haven’t been met as the foundations have allowed for this damage to occur. But I don’t agree with that point as this could then be interpreted that no property built when these regulations were in force should ever suffer from subsidence – which would be unreasonable. However, I do understand the general point that Aviva is making here. I think it is fair to say that there was a duty to build the extension to an appropriate standard – by designing the foundations to ensure they could support the structure over a reasonable period of time. As Mrs T’s property wasn’t newly built in 1982 and there is no evidence to show that the regulations at the time for extensions required adherence to the same guidance as new build properties, the builder wasn’t required to comply with these standards. So, I don’t think these should be considered. I would therefore need to see evidence of relevant guidance or standards from the time of the construction with specific foundation depth requirements which would be pertinent to the build of Mrs T’s extension (rather than new build properties). Currently Aviva hasn’t provided such evidence. So, I cannot currently agree that the extension wasn’t built to an appropriate standard.

When looking at complaints regarding defective design of foundations, it is important to consider the time that has passed since construction. Aviva has mentioned that the first signs of cracking in the property occurred around 1994 but it hasn’t provided any further evidence to show this was as a result of foundation movement. And from the information we have available, the movement that has occurred since 2010 has been attributed to roots from trees and other vegetation, but the property has stabilised once these have been removed. So, it would seem that this damage hasn’t been caused by any foundation movement. As the property had been standing for almost 30 years by that point, even if Aviva now believes the foundations are not of a suitable depth, I’m persuaded that the foundations have supported the building for a reasonable period and therefore they have

stood the test of time. I'm of the opinion it would be unreasonable to say this claim has been caused by a defective design.

Having carefully considered this matter, I don't think there is enough evidence to support Aviva's decision to decline the claim on the basis of the defective design of the foundations. So, I'm persuaded that Aviva needs to accept the claim. That will mean it should carry out the appropriate repairs. But as I've already mentioned, I'm satisfied Aviva has shown that the property has stabilised and therefore it doesn't need to carry out works to the foundations, such as underpinning, to deal with the claim fairly.

Our investigator recommended that Aviva pay Mrs T £150 in compensation for the distress and upset caused. I'm aware that this Mrs T has been suffering from poor health throughout this time and the delay in resolving this matter will have had an impact. So, I'm persuaded that Aviva should pay Mrs T £150 in recognition of the ongoing delays.

Aviva responded to confirm it accepted the provisional decision. Mrs T also responded. She said there was a sunken lawn next to the kitchen extension which has lowered the level of the ground. She says this is the level Aviva has used when deciding the foundations are too shallow. And she has also referred to letters she has from around the time the extension was built which outline what works needed to be done to qualify for a council grant and refers to a completion certificate provided which certifies that the property is fit for human habitation.

In relation to the movement monitoring, Mrs T has provided crack and level monitoring reports from September 2019 which she says show that there is still movement. She has also questioned the independence of the experts providing this information as she feels that they will be trying to keep costs down on behalf of their employer, in this case Aviva.

my findings

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

I've thought about Mrs T's comments carefully, but these don't persuade me to alter my outcome.

I thank Mrs T for providing more information and explanation around why she thinks Aviva shouldn't be disputing the issue of the foundations. As explained in the provisional decision, I'm not satisfied that Aviva has shown that the foundations are of a defective design. So, this means Aviva cannot fairly decline the claim on that basis. It must consider the claim and complete the appropriate repairs.

In relation to the point about the movement, I've seen the monitoring reports that Mrs T has sent to us. These particular reports from September 2019 were part of the information reviewed by Aviva's engineer. As detailed previously, the engineer has explained that the movement is minimal and within seasonal tolerances, so I'm persuaded the property has stabilised - Aviva doesn't therefore need to carry out works to the foundations. I've noted Mrs T's concerns in relation to the independence of the expert but there is no evidence to demonstrate that his conclusions are inaccurate. The report details a plausible explanation for the minimal movement and, without evidence to the contrary, I'm still of the opinion that it is reasonable for Aviva to rely on this information and only complete the appropriate superstructure repairs.

Mrs T has referred to other outstanding repairs needed on her property that she hasn't pursued due to this ongoing matter – she said it didn't make sense to complete these works if it was agreed that the foundations needed repairing. I appreciate why Mrs T may have put other repair work on hold and that this has likely caused her inconvenience. As explained in the provisional decision, Aviva needs to pay compensation to Mrs T of £150 in recognition of the delays.

my final decision

For the reasons stated above, I uphold this complaint in part.

I require Aviva Insurance Limited to do the following;

- Accept the claim
- Pay Mrs T £150 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs T to accept or reject my decision before 22 April 2021.

Jenny Giles
Ombudsman