

## The complaint

Mr and Mrs D complain about Aviva Insurance Limited's decision to turn down their buildings insurance claim and cancel their policy.

## What happened

On 14 February 2022 Mr and Mrs D bought their property. On 23 February 2022, they took out a buildings insurance policy with Aviva. Due to crack damage in their property, Mr and Mrs D arranged for a structural inspection to take place on 17 March 2022. This found the damage was due to structural movement, and it was thought this was because of the type of soil on which the property was situated. The report said there was a significant risk of movement in the future due to the compression and shrinkage of the soil, leading to progressive subsidence.

Mr and Mrs D made a subsidence claim under the policy in May 2022. Aviva turned down the claim because it said the damage had been present before the policy started. It issued a final response on that basis.

Aviva later told Mr and Mrs D that it thought they hadn't answered a question about subsidence accurately when taking out the policy. It advised them on 14 June 2022 that it was cancelling the policy.

Unhappy with Aviva's decision to turn down their claim and cancel their policy, Mr and Mrs D brought a complaint to this Service. We have considered the complaint under two separate cases.

Under the first case, our investigator concluded that it hadn't been fair for Aviva to rely on the relevant policy terms to turn down the claim. Aviva disagreed with our investigator. However, it accepted her outcome on the basis it could instead consider whether the claim should be declined due to a misrepresentation when the policy was taken out.

Aviva went on to decline the claim due to the alleged misrepresentation, and so Mr and Mrs D brought a further complaint to this Service – which is this second case I'm considering here.

Aviva said that Mr and Mrs D hadn't answered a question about subsidence correctly when taking out the policy. Our investigator accepted that Mr and Mrs D had made a careless misrepresentation about the property when taking out the policy. She therefore concluded that Aviva didn't need to pay the claim. However, she recommended that Aviva return the premium paid by Mr and Mrs D before Aviva had cancelled the policy.

I issued a provisional decision on 21 November 2023. Here's what I said:

### 'Misrepresentation

*Aviva says that Mr and Mrs D failed to take reasonable care not to make a misrepresentation when taking out the policy. The relevant law for misrepresentation is The Consumer*

*Insurance (Disclosure and Misrepresentation) Act 2012 ('CIDRA'). This requires consumers to take reasonable care not to make a misrepresentation when taking out a consumer insurance contract.*

*Mr and Mrs D applied for the policy online. I've therefore looked at what they were asked when taking out the policy.*

*The website explained that in providing a quote, Aviva had made some assumptions. It then provided a list of those assumptions and asked, 'Do you agree with these assumptions?' and Mr and Mrs D could answer either yes or no. It was made clear that reasonable care should be taken to give full and accurate answers (and if not, Aviva could cancel or change the policy, or refuse to pay a claim).*

*One of the assumptions said:*

*'The home has not suffered from subsidence, heave or landslip damage'*

*Aviva has confirmed that Mr and Mrs D selected 'yes' to all the initial assumptions, including the above. If they had answered 'no', then I see the quote couldn't continue for a property that had suffered from subsidence, heave or landslip damage.*

*I've considered Mr and Mrs D's circumstances to decide whether they could have reasonably been expected to answer this differently.*

*Mr and Mrs D advised Aviva's agent that they hadn't viewed the property before it was purchased, and hadn't arranged any pre-purchase survey. They told the agent that, after obtaining the keys, they first visited the property on 16 February 2022 and found various areas of cracking within the property and distortions to the living room floor. They arranged for builders to attend to do the repairs, but were advised to get a structural report.*

*I've read the March 2022 structural report. This says the company was commissioned to carry out an inspection to establish the causes of crack damage and significantly sloping floors. The report highlighted numerous areas of crack damage, and said the property had suffered from damage as a result of structural movement (which was foundation related). It classified the damage as four, with zero being negligible and five being severe.*

*Given the level of damage identified in the March 2022 report, I'm satisfied it's reasonable to conclude that this existed before the policy was taken out the month before. Some areas where the crack damage was particularly noticeable in the photos contained in the report were the bay window, living room ceiling, and in the conservatory.*

*I don't know when the builders attended the property and advised Mr and Mrs D to obtain a structural report. However, as Mr and Mrs D had apparently visited the property on 16 February 2022, I think they would have been aware there was crack damage to the property before the policy was taken out. Whilst they may have been hoping this wasn't anything serious, they didn't know either way. I've noted Mr and Mrs D's point that the sales advertisement described the foundations as being 'solid'. Nonetheless, I think a reasonable person would have suspected there could be subsidence after seeing the damage, particularly since a pre-purchase survey hadn't been done to confirm otherwise.*

*That being the case, it seems to me Mr and Mrs D shouldn't have answered 'yes' to the assumption about subsidence (which I find to have been clear) until investigations had taken place and they knew whether or not the damage was indeed subsidence. I therefore find they failed to take reasonable care and so there was misrepresentation.*

*I've also considered whether the misrepresentation would be considered 'qualifying' for the purposes of CIDRA. In other words, whether Aviva would have done something different if it had known there was existing subsidence. As the quote could not continue if Mr and Mrs D had answered 'no' to the initial assumptions, I'm satisfied Aviva wouldn't have offered the policy to Mr and Mrs D.*

*However, although I agree with Aviva that Mr and Mrs D made a qualifying misrepresentation, and that it would normally be able to avoid the policy and decline the claim for this reason, I don't think that would be fair and reasonable here. I'll explain why.*

*Misrepresentation wasn't the initial reason that Aviva gave to Mr and Mrs D when turning down their claim. The claim was turned down because Aviva said the damage had been there before Mr and Mrs D had purchased the property and taken out the policy. It therefore relied on the policy terms to turn down the claim. Aviva also cancelled the policy mid-term, rather than avoiding it from the start.*

*It's not reasonable to tell consumers their claim is being turned down for one reason, only for an insurer to later change its mind and rely on CIDRA to turn down the claim for misrepresentation. I'm satisfied that Aviva was aware, after receiving the March 2022 report, that there was obvious crack damage to the property and that Mr and Mrs D had visited the property before taking out the policy. Aviva therefore ought to have known that Mr and Mrs D had failed to take reasonable care not to make a misrepresentation about the subsidence at that point.*

*So, by dealing with the claim and making a claims decision based on the policy terms, I find that Aviva affirmed the contract and effectively waived its right to rely on the misrepresentation.*

#### Policy terms

*Under the first case, our investigator made an informal finding on Aviva's decision to turn down the claim by relying on the policy terms. She concluded that Aviva's decision hadn't been fair.*

*Aviva argued against this at the time, but then accepted our investigator's findings on the understanding it could turn down the claim and avoid the policy due to misrepresentation.*

*However, our investigator should have made it clear to Aviva that as it had already affirmed the contract it couldn't go on to allege there had been a misrepresentation. I'm satisfied that if we had made this clear, then the matter would have been referred to an ombudsman at the time. I therefore consider it appropriate for me to consider Aviva's original decision to decline the claim and policy cancellation as part of this case.*

*The policy says:*

**'We won't pay for:**

**...**

**3. Events before the cover start date**

**anything which happened or circumstances likely to lead to a claim (such as a flood warning being issued for your home) that you were aware of before the cover under this policy started.'**

*I've already found that Mr and Mrs D were aware of the cracks to their property before taking out the policy.*

*Our usual approach to subsidence claims is that where damage is both historic and ongoing, then the insurer should deal with damage caused during the term of the policy, even if the movement started before the policy did. But if the only way the insurer can repair new damage which it is liable for is to also repair older existing damage, then it should also repair the older damage.*

*However, I don't think it'd be reasonable to require Aviva to do so here. I'll explain why.*

*I'm satisfied, on balance, that the subsidence damage identified in the March 2022 report was historic damage and predated the start of the policy. I say that because only around three weeks had passed between the date the policy was taken out and the date of the inspection.*

*Mr and Mrs D didn't make a claim until 3 May 2022. By the time Aviva assessed the claim, further damage had apparently occurred at the property. In May 2022, Mr and Mrs D's neighbour had arranged for someone to put up a support due to falling plaster from their bay window. Then in early June 2022, Mr and Mrs D reported further cracks, wall movement, and roof tiles slipping.*

*The policy says:*

***'What you need to do***

*As soon as you're aware of something that's likely to lead to a claim you must:*

*...*

- contact us as soon as you reasonably can and give us all the information and help we need to settle your claim'*

*It seems to me that if Mr and Mrs D had reported the subsidence to Aviva as soon as they had received the March 2022 report, then the claim would have been assessed and a claims decision likely made in April 2022 (as well as the policy cancelled). As no further damage was reported before this, then there would have been no new subsidence damage for Aviva to deal with. In other words, no damage would have occurred whilst the Aviva policy was in force.*

*So I find that it was reasonable for Aviva to rely on the above exclusion to turn down the claim.*

*Cancellation of policy*

*I've also considered Aviva's decision to cancel the policy in June 2022.*

*The policy says:*

*'During the life of **your** policy **you** need to tell **us** about any changes to the information **you**'ve given **us**...'*

*And*

*'When **you** tell **us** about a change **we** will tell **you** if this affects **your** policy (for example if **we** can no longer offer cover or if **we** need to change **your** premium).*

*Mr and Mrs D did comply with this ongoing duty of disclosure as they told Aviva when they learnt that there had been subsidence. Though this was via a claim being made, rather than advising Aviva that the previous information given to it about there being no subsidence was wrong.*

*Aviva has provided evidence, by way of a statement from its underwriter, that it wasn't prepared to continue to offer cover because the property had suffered structural damage which wasn't repaired. Given that subsidence which is not stabilised can continue to cause significant damage to a property, I think it's reasonable to say there had been a fundamental change to the risk here.*

*The policy that Mr and Mrs D took out was designed to cover unknown risks. But if Aviva had kept the policy in force, this would have been in the knowledge that it would need to deal with the future new damage that would most likely occur, and as a result, may well have to put right the historic damage too. Taking into account the unusual circumstances of this case, I think it was reasonable for Aviva to cancel the policy.*

*I recognise my decision will disappoint Mr and Mrs D, but I don't intend to uphold this complaint.'*

I asked both parties for any further comments they wished to make before I made a final decision.

Aviva didn't provide any further comments.

Mr and Mrs D responded with the following main points:

- No physical or digital risk assessment was carried out by Aviva within the 14-day period. They think Aviva failed in its responsibilities by not doing a check on the house and they say Aviva was aware the area was a 'known hotspot' for subsidence. They also think the onus falls on an insurer to perform a risk function check on the property and area.
- With the contents of a subsidence report, Aviva failed to do an assessment on the policy and kept it running. As Aviva didn't take appropriate action and cancel the policy when it became aware of the historic subsidence, they should be covered for any ongoing damage.
- They answered the question about subsidence honestly as the house was advertised as having a 'strong foundation'.
- They say the policy term that Aviva relied upon to turn down their claim doesn't apply, and that subsidence is not something that happened as it's an ongoing issue.
- The policy only says the insured should contact Aviva as soon as they reasonably can when they're aware of something that's likely to lead to a claim, and doesn't give a specific timeframe.
- As Aviva failed to carry out its administrative duties with regards to risk assessment on multiple occasions, this kept the policy active for subsidence claims.

### **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 only summarised the points Mr and Mrs D have made in response to my provisional decision. That's not intended as a discourtesy, it merely reflects the informal nature of this Service. I've addressed Mr and Mrs D's points below:

- Mr and Mrs D have said Aviva didn't carry out a risk assessment within 14 days. I assume they're referring to the 14-day cooling off period after the policy started. To be clear, I wouldn't expect an insurer to carry out a risk assessment after a policy is taken out. An insurer assesses the risk presented to it based on the answers given by an applicant when applying for the policy. So Aviva would have been reliant on what Mr and Mrs D told it about the property when they took out the policy. An insurer isn't required to carry out an assessment to check the information it has been given by an applicant is true.
- Aviva kept the policy running after it learnt of the subsidence because Mr and Mrs D had made a subsidence claim, rather than inform Aviva the information they'd provided when taking out the policy was incorrect. After Aviva assessed the claim, it cancelled the policy when it realised the subsidence predated the cover.
- Mr and Mrs D disagree with me that they answered the question about subsidence incorrectly. I won't repeat my findings on this. In any event, I've concluded that Aviva can't rely on misrepresentation to turn down the claim.
- I remain satisfied that the policy term Aviva relied on to turn down the claim does apply here. The policy covers loss or damage to the buildings caused by a number of insured perils, including subsidence. However, the evidence supports that the subsidence damage identified in the March 2022 report happened before the policy was taken out.
- I don't require Aviva to cover the ongoing damage caused to the property. Although the policy doesn't give a timeframe in which to tell Aviva when the insured becomes aware of something that's likely to lead to a claim, it does say this should be done as soon as the insured reasonably can. It took Mr and Mrs D nearly six weeks to tell Aviva about the subsidence after they received the report. I explained in my provisional decision that I thought Mr and Mrs D ought to have reported the subsidence to Aviva sooner than they did, and if that had happened, then the claim would have likely been turned down and policy cancelled before any further damage occurred.

Overall, I remain satisfied that it was appropriate, in the particular circumstances of this case, for Aviva to turn down the claim and cancel the policy.

### **My final decision**

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D and Mr D to accept or reject my decision before 8 January 2024.

Chantelle Hurn-Ryan  
**Ombudsman**