

The complaint

Mr W, a sole trader, has complained about his commercial motor trade insurer, Aviva Insurance Limited, because it has declined his claim made for damage to his property caused by corroded fuel lines (for vehicle fuel pumps), which he believes resulted from leaking sewage water.

What happened

Mr W had a policy with Aviva in 2013, through 2014 and into 2015. It lapsed at the end of August 2015.

In late 2014, following some work in the area by the local council in 2013/early 2014, Mr W was notified by his neighbour that they could smell fuel. Mr W completed some initial checks and couldn't identify a leak but the council required, and/or did, further checks. In 2017, following soil sampling, which identified fuel contaminants in the soil, and some excavation works, damage was found to the fuel lines that serviced the pumps at Mr W's property. He made a claim to Aviva as he felt the leak dated back to the time of the Aviva policy in 2014 when his neighbour had first smelt fuel. Mr W also obtained two forensic reports from an engineer which concluded the council's work had likely exposed the pipes to sewage leaking from council water pipes, and this had caused accelerated corrosion to occur, damaging the pipes in a way that wouldn't be, and hadn't been, caused without that exposure.

Aviva didn't accept the findings of the engineer. Aviva thought the engineer's conclusions were somewhat inconclusive. And, in any event, it noted the reference to corrosion, feeling this was likely something which had occurred gradually. It referred Mr W to the policy exclusion for gradual damage. It said it was also unclear, whilst a suspected date of loss had been given as 2014, when the damage had first started occurring. During continued investigations into the claim in 2019 Mr W told Aviva that it was estimated that work to resolve the contamination at his property would likely cost £83,700 plus VAT. But Aviva wasn't prepared to accept any liability for the loss. Ultimately the council took over the remediation works and told Mr W it would bill him once it is all completed.

When Mr W complained to this service he said he wanted Aviva to cover the cost of remediation work at his property and his legal fees – at that time around £70,000, as well as paying compensation for the upset caused by its delay and mis-application of the policy wording. Our Investigator noted the nature of the pipes in question. That being they were underground and at least topped by concrete. He thought it wasn't reasonable for Aviva to rely on the gradually operating cause exclusion to decline the claim. He said it should pay the claim, plus interest. He didn't recommend payment of legal fees or compensation.

Mr W was satisfied by the findings. Aviva said it disagreed with them. Aviva explained its general dissatisfaction with this service's approach on gradual cause exclusions. But said that, in any event, it disagrees that the fuel pipe was damaged solely by exposure to leaking water. And, even if it was, that happened gradually and by a process of corrosion, with both corrosion and gradual cause damage being excluded under the cover. Aviva also pointed out that it was only on risk until 2015, and the leak, and damage, had continued well past that date. The complaint was passed to me for consideration.

I felt it should be upheld in that I thought Aviva should be paying towards the council's charges to Mr W, but not the full amount. Nor did I think it should have to reimburse Mr W's legal fees, nor pay compensation. I issued a provisional decision the findings of which were:

“the damage in question

The ground around, and the buildings of the garage have been polluted and contaminated by leaking fuel. I think it's fair to say that both parties seem to agree that the leak came from a particular section of pipe, servicing the garage's forecourt petrol pump. And that the pipe had leaked because it had become corroded. I think it's further fair to say that both parties accept that corrosion does occur gradually but that, in this case, the process had likely occurred more quickly than normal. With the accelerated period likely starting in 2013 when the council exposed the pipe. The damaged pipe having been removed in 2017.

policy cover

The policy was in place in 2013, 2014 and through to the end of August 2015. The policy offers cover for damage “occurring during the period of cover”. The policy says it will pay to repair a property to the condition it was in immediately before the loss.

The policy is one known in the industry as “all risks”. Essentially damage “howsoever” caused is covered. But like all insurance policies there are exclusions to the cover – so if damage is caused in a way the policy specifically excludes, there won't be any cover for it.

policy exclusions

The policy does exclude gradual deterioration and wear and tear. It also separately excludes damage caused by corrosion (although corrosion is, in itself, a gradual process of deterioration).

The policy also excludes damage caused by pollution and contamination – unless that is to vehicles. But, that exclusion continues to explain that, unless otherwise excluded, there will be cover for pollution and contamination where that is caused by a “defined contingency”. The policy says that ‘escape of water’ is a defined contingency.

gradual cause exclusions

As noted by our Investigator, this service has an established approach to gradual cause exclusions. And this approach isn't restricted to just exclusions which specifically refer to something like ‘damage occurring gradually’. Rather our approach applies to any exclusion that seeks to limit an insurer's liability for any type of gradual damage. As I noted above, corrosion, by its nature, occurs gradually. So the corrosion exclusion falls for consideration under our ‘gradual cause’ approach just as equally as the specific exclusion for gradual deterioration does.

Essentially our approach notes that the policy allows for damage like this to be excluded. But we consider whether it's fair for an insurer to rely on that term to decline liability. In short we consider whether a policyholder, where damage is occurring out of sight, acted reasonably during the period in question, given what they knew or reasonably should have known, to prevent and forestall damage occurring. If we think they acted reasonably then we usually won't find it fair for an insurer to rely on the exclusion to decline the claim.

the cause of the damage in question

The most persuasive evidence I've seen are the two reports from the engineer. I say that not least as, as far I've seen, he seems the most appropriately qualified person to give a view on the damage. But I also find his first report completed in 2018 to be sufficiently detailed and reasoned to be compelling. He doesn't (as Aviva has noted) use phrases such as ‘I think this is what most likely happened’. But the thrust of the report overall leads me to think that the

pipe's exposure to sewage water was most likely a dominant cause of the leak. And his finding in that report is supported by the further report completed in 2021, after he'd been able to examine sections of pipe that had not been exposed to sewage water and compare their condition to the section of pipe which had (and had leaked). I'm satisfied that, but for the fact the pipe was exposed to sewage water, it wouldn't have leaked causing damage, in the form of pollution and contamination, to Mr W's property, including its surrounding land.

As noted above, the policy offers cover for pollution and contamination where that is caused by a defined contingency. Sewage water should not have been in the ground around the pipe. It had escaped its confines of the nearby drains. Escape of water is a defined contingency. So unless I think Aviva can reasonably rely on the gradual deterioration or corrosion exclusion ("gradual damage exclusions") to decline the claim, it will have to cover the damage which occurred during its period of cover.

can Aviva fairly and reasonably rely on the gradual damage exclusions?

I think Mr W acted reasonably during the period of cover. I've not seen that the council consulted him on work it was intending to do in 2013 such that he was remiss for not ensuring he oversaw that work. I don't think he had any cause, before his neighbour alerted him to a smell of fuel in later 2014, to think that any damage might have occurred or any leak was in progress. Mr W says that once he was contacted by his neighbour, he checked his fuel level carefully and didn't detect a leak. I accept his word in this respect. I don't think it's likely he'd have ignored that, or that when he did checks he'd have ignored an identifiable loss of fuel. From a business income perspective alone that just wouldn't make sense. So I think he most likely acted reasonably to follow up on the report of a smell of fuel and found nothing to alarm him or make him think there was a leak in progress.

Seemingly though the smell of fuel hadn't gone away, and it worried the neighbour so much that in around early 2015 they contacted the council. From there, from what I have seen, the council dictated what tests and enquiries were needed. And also from what I have seen, Mr W complied with those requests, seeming to work with the council to assist it in establishing the cause of the smell. At the time Aviva came off risk in late summer 2015, the leak had yet to be found. And no damage and/or loss, or liability for the same had yet been established. So I don't think if Mr W had contacted Aviva at any time before 2015, anything different would have happened. I think enquiries would have remained on-going and the damage would have continued as it did. In the circumstances I don't think it would be fair or reasonable for Aviva to be able to decline liability based on the gradual cause exclusions.

how should this be settled

But damage was continuing in 2015, and it didn't stop occurring until summer 2017. Water was continuing to affect and further corrode the pipe and/or further fuel was leaking out causing damage. So damage was occurring after Aviva's policy ended. And that policy only offered cover against damage occurring during its term. So, whilst it wasn't Mr W's fault that damage continued to occur after the policy ended, it wasn't Aviva's fault either. And I can't say it would be fair or reasonable for it to be made liable for damage that so clearly sits outside the scope of the cover of the policy (because it covers damage occurring during its term).

Mr W has shown a repair estimate completed for him by a remediation company. The company had confirmed that the work required to reinstate Mr W's property would likely cost £83,700 plus VAT. But this company is not doing the work on behalf of the council and the council will be billing Mr W for work done once the programme of work has completed. And I see that the council has recently written to Mr W to advise that the cost of necessary works (not just those at Mr W's property) has increased by up to £100,000 (although from its letter it isn't clear how the cost for work is split between Mr W's property and any other works

necessary in its vicinity). As the council have taken over the works, I have no way to reasonably question or challenge the scope or its cost.

But, that said, I think I have to have regard to whether all the work detailed fairly falls for cover under the policy. And I don't think it does. My concern in this respect is the work to decontaminate and decommission the underground fuel storage tanks. I see that, in 2017, due to the leak, Mr W stopped being licensed for selling fuel. The council also clearly had environmental concerns, and it wanted to mitigate the future risk of contamination in the area around the garage. It seems most likely to me those two factors are the main reasons for the tanks needing to be removed. In any event the tanks are not 'damage to the property' caused by the leak resulting from the escape of water. And they weren't the cause of the damage which occurred during the period of cover. As I've said, it's damage to the property, occurring during the period of cover that the policy promises to repair. So I intend to discount any liability for Aviva for the cost of this work, along with the associated VAT.

As I've explained, I'm satisfied that Aviva has some liability for the other work to remediate Mr W's property and its cost. I've no real way to know how much damage occurred during Aviva's time on risk. So I'm going to take a 'broad brush' approach to this in order to reach what I think is a fair outcome. I think the damage was most likely going on for no more than four years – 2013 to 2017. And Aviva came off risk roughly half-way through that four-year period. So as it was on risk for roughly half the time, I think it fair to say it's reasonably liable to Mr W for half the cost charged to him by the council, inclusive of VAT, for the work to remediate his property, not including any costs associated with decontaminating and decommissioning the fuel tanks. As Mr W hasn't paid the council yet, I won't be requiring Aviva to add interest to any settlement made.

legal fees

It is not this service's usual approach to require a respondent to a complaint to reimburse legal fees incurred by the complainant. That is because we are a free service. Put simply, when Mr W approached Aviva in 2017, and became unhappy with how it was handling his claim, with further disappointment occurring when it declined all liability for it, he could have complained to us directly. He did not need legal support for that. And if, during the claim with Aviva, he felt that a legal representative would be better placed to argue his claim for him, that was his choice to make. The policy didn't require it, and whilst I think Aviva was wrong to decline all liability for this claim, an insurer disputing and challenging a policyholder on liability is often a natural part of the claim process. So with regret for any worry this will cause Mr W, I don't intend to require Aviva to reimburse his legal fees.

compensation

I don't think this was a straightforward claim. Whilst I think Aviva's ultimate decline of it was wrong I can see why, along the way, it had concerns about its liability for the reported loss. And I bear in mind that I've not found it is liable for the loss in its entirety. I also bear in mind that much of Mr W's worry has been caused by accruing legal fees, as well as his liability for damage to other properties (which are not the subject of the claim being considered under this complaint). Taking everything into account, I'm not persuaded that an award of compensation, on this occasion, is fairly and reasonably due."

Aviva said it generally accepted my findings – but it wanted to be clear that was on a without prejudice basis to any public liability claim. And it also said it wouldn't pay VAT to Mr W as he/the business is VAT registered (meaning he can claim any VAT for works back from HMRC).

Mr W said he was also generally pleased by my decision. But he said:

- he feels it doesn't account for Aviva's loss adjuster having exacerbated the leak when investigating matters.
- my approach to the legal fees sits in contradiction of my comment that this was not a straight-forward claim which Aviva had rightly had liability concerns for.
- it's not reasonable to think that he, as a layperson could have developed the technical arguments on cover without legal support.
- additional cover under trace and access and debris removal covers should be available.
- interest should be awarded – if some payment had been made earlier, he could have done some remediation work himself, but as it was the council took over and it is likely it will charge him interest from the date it served notice on him.
- a lot of time was spent getting answers from Aviva, this was a source of distress.

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 noted Aviva's comment regarding its wider liability. But I'm only assessing its liability for the damage claim.

I know Aviva would usually not pay VAT where a policyholder is VAT registered. But here I think it is fair to say Aviva should pay half the VAT charged by the council for works. Mr W is already facing a large bill outside of the scope of what I'm asking Aviva to pay. Whilst he can claim VAT back, to do so he would still have to first find the money to discharge the council's bill, and then go through the reclaiming process. In the circumstances I don't think it's reasonable to make him do that for the entire VAT cost.

Mr W is right in that my provisional findings haven't specifically accounted for Aviva's loss adjuster allowing more fuel to leak into the environment when completing investigations. But I did explain provisionally that I have no way of knowing how much fuel leaked, in what proportions and when during 2013 to 2017. Likewise, I can't know how much more damage to the area the loss adjuster caused – or how his actions affected the bill for the clean up work. I'm satisfied that a straight split of half liability is a fair and reasonable outcome.

I've not made any contradiction. This was not a straightforward claim for Aviva to deal with. And it clearly was never going to be simple for Mr W to navigate. But his having legal assistance and the arguments created didn't cause Aviva to accept the claim. And this service sees many complaints about complicated claims brought by complainants with no representation. Our service is free to any eligible complainant and doesn't require a complainant to use legal representation to bring a complaint. I won't award legal fees.

This complaint focused on the cost of remediation work. If Mr W thinks he has a valid claim for trace and access under the policy, he is free to approach Aviva in that respect. But he may wish to refer to his policy before doing so to see if, in the circumstances here, where fuel has leaked from a petrol pump supply pipe – the policy would cover for that.

In respect of debris, the policy does offer separate cover. But, as I understand it, the council is completing all work, including debris removal. And I've given my view on Aviva's liability for the costs the council will charge for its work. Portioning or separating out the liability

under separate covers of the policy won't change the level of liability against which I think it's reasonable to make Aviva pay.

Costs haven't yet been levied by the council. But my provisional decision was that Aviva was liable for half of the cost charged by the council. So if it charges interest then Aviva will have to pay half of that cost too. But I'm satisfied Aviva didn't have total liability for this loss. So the best position Mr W might have been in, if Aviva had agreed some liability earlier on, would have been for it to have paid him half the likely clean-up cost. If he had used that to do some work (assuming the council would have let him go ahead and only do part of the work), the council would still have had to pick up the rest – with costs such as interest attaching to that portion and being levied against Mr W. And, in any event, I'm not persuaded that the council would have let only part of the work be done. So I don't think it would be fair or reasonable for me to make any additional award.

I can understand that Mr W would, at times during the claim, have liked answers from Aviva sooner. But I remain of the view, as stated provisionally, and for the same reasons, that my awarding compensation here would not be fair or reasonable.

Putting things right

I require Aviva, upon sight of charges levied against him by the council, to pay Mr W, having subtracted the cost of decontamination and decommissioning work to the fuel tanks, half of the cost charged by the council, including any VAT, for the work it undertook at his property to remediate the pollution and contamination.

My final decision

I uphold this complaint. I require Aviva Insurance Limited to provide the redress set out above at *"putting things right"*.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 10 June 2022.

Fiona Robinson
Ombudsman