

The complaint

Mr B and Mrs B complain about Aviva Insurance Limited's decision to decline a claim under their legal expenses insurance (LEI) policy.

Any reference to Aviva includes the actions of its agents. Because Mr B has been leading on this complaint, for ease, I've referred to him throughout my decision.

What happened

The circumstances of this complaint are well known to both parties, so I've summarised what's happened.

Mr B has an LEI policy which is underwritten by Aviva. An easement permits his neighbour to extract water from a water pump on his boundary. Mr B says he hasn't been able to grow crops or raise animals on his land owing to it being affected by contaminated water which has overflowed from the pump. So, Mr B sought to use his legal cover to pursue action against his neighbour and obtain costs to decontaminate his land.

Mr B says Aviva's legal helpline advised him to serve a letter of notice to the neighbour – which he did in February 2023. In response, the neighbour said Mr B was responsible for any contamination on his own land.

Mr B wanted to pursue further legal action, but Aviva declined the claim saying the dispute related to an incident which had been the subject of a previous claim – and for which the indemnity limit had been exhausted.

Mr B disagreed it was a continuation of a previous claim saying the earlier claim was about the supply of electricity to the neighbour's water pump and how his property was powering it via an underground cable. Mr B says having given his neighbour notice that he'd be turning off the electricity supply, the neighbour pursued a legal claim against Mr B. And so, Mr B claimed on his legal expenses cover to defend court action which had been taken against him.

The issue of the neighbour's easement rights was litigated, with the judge saying the neighbour's easement allowed them the benefit of accessing the water but that Mr B didn't have to supply the electricity. Mr B says the contamination to his land wasn't considered by the court. And so, is a new issue – and separate to the easement and electricity supply previously litigated.

Aviva maintained its position, saying the new claim could only arise after the original claim and the declaration that the neighbours had the benefit of the easement. It referred to the policy exclusion which says:

"We will not pay for: [...]"

d. Claims where the initial dispute or series of incidents leading to a claim on this policy happen before this cover starts or that begin after it comes to an end as shown

on your schedule. You can only make one claim for all disputes arising from the same incident.”

Mr B disagreed, and so, brought a complaint to this Service. An Investigator considered it and initially said Aviva had fairly relied on the exclusion to decline the claim. She said the water toxicity and contamination of the land stemmed from the water supply - even if the toxicity of it wasn't known until later.

Mr B's barrister (who I'll refer to as "R") provided further information saying the first legal claim dealt with the rights the neighbours had over the water pump. He said this was unclear as those rights hadn't been registered. The second claim deals with whether those rights are causing damage to Mr and Mrs B's land by way of private law nuisance. R explained that whilst the water quality was raised in the first claim, the quality of it was never determined – because it wasn't relevant.

The Investigator considered R's comments and changed her view. She said the incident which resulted in the first claim was the issue of the power supply to Mr B's neighbour's property – which just happened to involve the water pump. Whereas, the second claim was about the quality of the water – which she didn't consider to be the "same incident".

She'd considered Aviva's comments that the water quality had been brought up in the legal proceedings but said there was clear evidence the judge hadn't considered this in any way and had ordered it to be dismissed. So, she said Aviva should accept Mr B's second claim as a new one and progress it accordingly.

Aviva disagreed and said:

- The policy provides cover for an insured event – which here is the interference with Mr and Mrs B's land under the property section of the policy.
- The interference is the neighbour's entitlement to water extraction from Mr B's land under the easement. The existence of a water supply going from his land to the neighbours was the issue and interference.
- Mr B's barrister had said in their opening merits *"The water supply is the lead issue. The first incident/dispute is whether the neighbour is entitled to water extraction."*
- The fact Mr B turned off the electricity supply to the water pump is the second incident of the dispute which was already in existence.
- Capping off the water supply due to contamination was raised in Mr B's legal defence, so it is a continuation of the issue causing an interference. Aviva said 'but for' the existence of the water supply – which is an interference – the contamination issue wouldn't have been raised.
- If Mr B's defence had been successful and the easement had been removed, the issue would have resolved itself. And so, it is a dispute arising from the same incident, which is namely, the interference caused by the easement.

The Investigator considered Aviva's points, but it didn't change her mind. And so, the complaint has been passed to me for an Ombudsman's decision.

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.

And I've kept in mind Aviva's responsibility as an insurer to handle claims fairly and to not unreasonably decline a claim. Having done so, I agree with the outcome our Investigator reached. Before I explain why, I want to assure the parties I've read all the information provided – but because we are an informal service, my decision won't mirror the level of detail provided to us. And I've only focussed on the issues and evidence I consider key to deciding this complaint.

It's not in dispute the legal claim Mr B is seeking to pursue is an insured peril, but Aviva says it's not covered because the dispute arises from an incident previously claimed for – which is an exclusion under the policy terms. So, the issued to be decided is whether Aviva's decision to decline the claim on this basis is fair.

I note R has said the legal claims concern two distinct areas of law – namely, easement rights and nuisance - which in his opinion, demonstrates the claims don't arise from the same incident. Whilst I appreciate two distinct areas of law apply to each legal claim respectively – and how this *might* in some circumstances demonstrate why the incidents aren't related – what's key is whether the dispute arises from the *same incident*. So, whilst I don't find this particular aspect of R's argument to be persuasive, I am otherwise satisfied, the legal claim Mr B now seeks to pursue *doesn't* arise from the same incident and should therefore, be considered a new and separate claim. I'll explain why.

Aviva's argument is essentially “but for” the water pump and supply on Mr B's land – which it says is the interference - the contamination issue wouldn't have been raised. But I'm not persuaded that alone is enough to say the current claim arises from the same incident as the first. To me, they are distinct, and I say this because the first claim was about whether Mr B had to supply electricity to his neighbour and the second was about the water overflowing on to his land, and it being contaminated. Mr B discovering he was supplying electricity to his neighbour's property and turning it off (as advised) is what led to the legal dispute and in turn litigation about the neighbour's easement rights. The second claim is about water overflowing from the pump and the alleged nuisance this is causing Mr B. So, whilst I accept there's a connection between the disputes - in that they both concern the water pump - I'm not persuaded the disputes arise from the same incident.

Aviva has said the contaminated water issue was raised during the first claim – which in its opinion shows the new claim arises from the same incident. But from what I've seen, the results of the water testing weren't the subject matter of the litigation. I also note the judge didn't comment on the results. So, I don't consider the quality of the water having been referenced in court to be persuasive evidence of the current claim arising from the same incident.

Ultimately, the first claim was about whether Mr B had a responsibility to supply electricity and the neighbour's easements right regarding the pump – it wasn't about the quality of the water and the alleged nuisance it's now causing Mr B. And so, I don't think it's fair for Aviva to decline the new claim and it should instead accept it subject to the remaining terms and conditions.

My final decision

My final decision is I uphold this complaint and direct Aviva Insurance Limited to accept Mr B and Mrs B's claim – treating it as a new and separate claim – subject to the remaining policy terms and conditions.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to

accept or reject my decision before 25 April 2024.

Nicola Beakhust
Ombudsman