

## **The complaint**

Mr F, a sole trader, complains about the decision of Aviva Insurance Limited to decline his business interruption insurance claim.

## **What happened**

The following is intended only as a summary of the key circumstances. Additionally, whilst other individuals have been involved in the correspondence, for the sake of simplicity, I have just referred to Mr F and Aviva.

Mr F operates a vehicle repair and MOT garage. He had a commercial insurance policy underwritten by Aviva. The policy provided a number of areas of cover, including business interruption. In January 2023, access to Mr F's garage was apparently temporarily restricted and/or prevented as a result of works associated with a neighbouring development. Mr F contacted Aviva, and was initially led to believe he would be entitled to claim. However, when a claim was submitted, Aviva declined this.

Aviva made a number of comments when declining the claim and the subsequent complaint that arose that do not seem to accord with the policy wording Mr F had. However, Aviva's main argument was that the damage needed to be fortuitous in nature, rather than being part of planned roadworks. Aviva did offer Mr F £350 for the issues with claim handling.

Mr F brought his complaint about the claim decision to the Financial Ombudsman Service. Our Investigator recommended that the complaint be upheld. He considered that there was damage that had, potentially, prevented or restricted access to Mr F's premises. And that the cause of this damage should not prevent Mr F claiming in the circumstances.

Aviva did not agree. It said that the intention of the policy was not to provide cover against planned roadworks. And that the lawful and planned digging-up of a roadway for development or maintenance purposes cannot properly be categorised as "damage".

As our Investigator was unable to resolve this complaint, it has been passed to me for a 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.

Having done so, I am upholding this complaint. I'll explain why.

The first thing I should say is that I do agree with Aviva's position to an extent. I do not consider that insurers would generally intend for there to be cover from their policies where works are carried out by a local council or similar which cause a restriction of access.

If an authority that is responsible for the highway digs it up in order to, for example, lay an improved highway, I don't think this could be properly described as causing damage. With reference to Mr F's own business, if a faulty part is removed from a vehicle, the removal

itself is not causing damage but rather part of the process of making repair. A similar approach might be reasonable when thinking about roadworks by a local authority.

It should be noted though that the works involved in this case do not appear to have been carried out by a local authority. And they do not appear to have been carried out with a view to improving or maintaining the highway as such. The works were carried out by a private developer. Whilst planning permission had been granted for the development, it isn't even clear whether a licence had been granted under section 278 of the Highways Act 1980, section 50 of the New Roads and Street Works Act 1991, or similar. Certainly, Mr F has said that no notice was provided of the works.

Regardless, whilst most insurers will not necessarily intend to cover such claims, in determining whether or not Mr F's policy covers his claim, it is necessary to consider what that policy says. And to think about how this would most likely have been interpreted, at the time it was entered, by a reasonable person with all the relevant background information.

Aviva has referred to certain wording that does not appear to form part of Mr F's policy. Mr F's policy provided cover, in relation to property damage, on an All Risks basis. This means that all causes of damage are covered, other than those excluded by the policy. The business interruption section provided cover where there had been Damage, unless excluded by the All Risks section, to property at the premises or in a number of other situations. One of these situations was where Damage to property within a mile of the premises physically prevented or restricted access to the premises.

Damage was defined in a fairly common way as being "physical loss, destruction or damage". The use of the uncapitalised "damage" within this definition means that this needs to be interpreted in part by reference to this word's everyday meaning.

There have been a number of legal judgments which have discussed what "damage" means. But these have largely focussed on the need for a change to the physical state of property, etc. It doesn't appear to be disputed that the works involved changing the physical state of the ground outside of Mr F's premises. The issue is more over whether the intention to do this alters whether damage has occurred.

Aviva's main argument is that "damage" requires a degree of fortuity or "something that was not intended to happen in the ordinary course". Certainly, if the policy defined this as "accidental" I would agree. And as the developer intended the works, this would not be accidental.

It may well be that the works and resultant damage could fall under what would normally be considered malicious damage. Damage by malicious persons is referred to within Mr F's policy as being something that is largely covered. The works were not carried out with an intention to cause harm though. And the intention was, presumably, always to rectify any damage caused to the property in question. I recognise that the works would always have created an obstruction to Mr F's property access. And the developer would most likely have, or reasonably ought to have, been aware that this could cause a financial loss to Mr F. But I am not overly persuaded this means the damage would fall under the category of malicious damage.

It isn't necessary for Mr F to demonstrate which "category" of damage the works fall under though. As noted, the property damage section of the policy is an All Risks one. And there is no exclusion relating to works carried out intentionally (but not maliciously).

So, this comes back to whether something can be described as damage in the absence of the "degree of fortuity" that Aviva has referred to. Given that damage, as envisaged by the

policy, can include that caused by malicious persons I am not persuaded that something that has been planned cannot be considered to be damage. A person planning to maliciously damage property would still be considered by the policy to have caused damage. And in the “ordinary course of things” Mr F would have retained access to his premises.

Ultimately, I am not persuaded that a reasonable person would interpret the policy in a way that would exclude a claim relating to damage that had been caused to a public highway by a private individual in the manner of the circumstances of this claim. So, I don’t consider Aviva can fairly and reasonably rely on this interpretation to decline Mr F’s claim in the circumstances of this complaint.

I’ll note here, as something of an aside, that there was apparently some damage to Mr F’s own property at the entrance to his premises. However, I agree with Aviva that this does not appear this was significant enough to be likely to be the proximate cause of any restriction of access. Had there been no other damage, this is unlikely to have caused any interruption to Mr F’s business. And, in the circumstances, the proximate cause of this interruption appears to have been the more substantial damage caused to the public highway outside of this entrance.

### **Putting things right**

Aviva Insurance Limited should reconsider Mr F’s claim on the basis that the private development works caused Damage.

### **My final decision**

My final decision is that I uphold this complaint. Aviva Insurance Limited should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr F to accept or reject my decision before 26 November 2024.

Sam Thomas  
**Ombudsman**