

## **The complaint**

Mrs P complains Aviva Insurance Limited has unfairly declined her claim for stock she said was damaged by a fire in a neighbouring building.

## **What happened**

Mrs P runs a clothing retail business. She has her stock in a unit. In March 2021 there was a fire in a factory close to her unit (with that factory producing a product which is a common human allergen). Mrs P says this was about 20 feet from her building, and when the fire service allowed her to go back into the building, there was debris from the fire and a putrid smell. Mrs P contacted Aviva to make a claim on her commercial insurance policy.

Aviva considered the claim, and several reports were carried out by experts appointed by Aviva and Mrs P. But ultimately Aviva declined it. It wasn't satisfied there was evidence that the fire had damaged the stock. Mrs P complained about that decision and in May 2022, an Investigator at the Financial Ombudsman Service considered the matter. He reviewed the many reports that had been carried out up to March 2022, but said Aviva had made a reasonable decision to decline the claim. Mrs P accepted the outcome and that complaint was closed.

In March 2024 Mrs P asked this Service to consider a further complaint on the matter. She said she'd provided further evidence to Aviva, particularly that the stock had been contaminated by allergens, but it still refused her claim.

Our Investigator said, as an answer had already been given by this Service, she'd only consider the evidence provided since we made our previous findings. Having done so, she thought Aviva had fairly declined the claim. She said it is down to a policyholder to demonstrate they've suffered a loss covered by the policy. And she didn't think Mrs P had shown she had a valid claim for damage to stock caused by contamination or pollution as a result of the fire.

Mrs P asked for an Ombudsman to consider matters. She said Aviva's expert, D, had first said there were no allergens in the property, but now accepts that there were. She says this shows D's report lacks credibility. She said if Aviva believe there is no risk, it should provide her an indemnity should a future customer develop a life-threatening reaction as a result of coming into contact with the clothing.

She said the stock smells of smoke, and given she provides high end clothing, she cannot sell it, nor can she launder it in order to sell it – as it wouldn't be classed as 'new'. So she's shown it has been contaminated by the fire as per the policy terms. She said she doesn't understand why Aviva can't pay her and recover its losses from the insurer of the factory.

## **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.

In line with what our Investigator has already set out, I can't revisit the evidence already considered by this service. That includes Mrs P's comments about Aviva's expert, D, and what its previous reports concluded. Those reports, carried out in 2021, have already been considered, with an outcome given and accepted.

Mrs P has said that some reports carried out by Aviva in 2021 were never provided to her. I don't know if she has complained to Aviva about that previously, or since making this complaint. But this complaint relates to more recent activity and evidence, so I haven't relied upon any of the 2021 reports when making my decision. As such, they haven't had any impact on the outcome I've reached. If Mrs P would like sight of those reports, she can ask Aviva to provide them

Moving on to the current complaint, the policy terms do cover damage caused by pollution and contamination of insured property (which is Mrs P's stock) which results from specified insured events. 'Fire' is one of those events. So if Mrs P can reasonably show that her stock has been damaged by pollution or contamination as a result of the fire then Aviva will need to meet the claim unless it can fairly rely on a valid exclusion to decline it.

Mrs P has said that the clothing has smoke damage, as it smells of smoke from the fire. And that, owing to the allergen processed in the factory, the clothing has been contaminated by that allergen. Since the conclusion of the first complaint with this Service, Mrs P has provided various comments and reports, including from an expert who I'll refer to as 'E' and from a professor in this area, who I'll refer to as 'P'.

Mrs P says a report by E supports her claim. It carried out smoke emission testing which it said showed smoke would've got into the premises on the day of the fire. And it concluded *"On 4 March 2021 smoke and [allergen material] entered Unit 1A because of a neighbouring fire. Therefore, it is likely that traces of [allergen material] protein entered the Unit 1A, although this was not sufficient to be detected (as the detection equipment was not sufficiently sensitive). I understand that such low traces are sufficient to cause a reaction. Therefore, the clothing within the unit is "damaged".*

So, there are two contaminants referred to by Mrs P and her experts – smoke and allergen material. And both Aviva and Mrs P have experts who have opposing views on whether the clothing is damaged by contamination or pollution. So my role is to decide which evidence I'm most persuaded by. Clearly there are also two different 'contaminants' to consider. I've reviewed the evidence for smoke damage first, before reviewing the evidence relating to the allergen.

#### Is there evidence the stock has been damaged by smoke from the fire?

E's report showed, through its smoke emission test, that it was possible smoke did get into the building, even with doors, windows and shutters closed. However, it did some testing on clothing samples, one that had been covered in plastic, another that hadn't been. It concluded *"there was no obvious particulate matter on any of the recovered fabrics examined when inspected both visually and microscopically"*. It further said, *"these results were typical across all fabrics tested with no clear traces of smoke/soot chemicals detected."*

Aviva's position in relation is that E's report confirmed there was no evidence of soot or fire related chemicals on the clothing testing. So it says there's no evidence that the stock has been damaged by the fire. It also said the smoke emission test doesn't accurately emulate the conditions on the day of the fire, so it shows its possible some smoke can get into the building, but that doesn't mean it's most likely it did on the day of the fire, or that that smoke did indeed cause damage. I think that's a reasonable position for Aviva to take.

I accept its possible, and even likely, that some smoke did get into the building on the day of the fire. But I'm not persuaded, based on E's comments above, that it's been shown any smoke which did ingress has resulted in any contamination of the items. Mrs P says it's unfair of Aviva to decline her claim as there is no scientific test to show that the items smell of smoke. I don't know if there is a test for that or not. But I have to decide this matter based on the evidence I do have. And that evidence doesn't, in my view, support that there was any trace of smoke on the clothing items.

#### Is there evidence the stock has been damaged by the presence of an allergen?

Aviva had initially doubted there was any allergens present in the building; it had said the matter found in the unit could've been leaf matter or something else, as opposed to allergen material. It was mindful that allergen testing of the matter had produced a negative result. P's comments, provided in January 2023, were that just because the allergen test used on the matter had returned a negative result, it didn't mean the matter wasn't an allergen. It said allergic reactions can be triggered by amounts lower than can be detected on the scientific test used. P was satisfied, based on her microscopic analysis, that the matter found was the allergen. Meaning there was an allergen present in the building.

Aviva said the scientific test carried out is amongst the most sensitive available for determining the presence of food allergens within an environment. So the negative result from that test shows there is no contamination.

Whilst I note Aviva's view on the test, I consider it's possible, based on P's microscope analysis, that there was allergen material in the premises, even if it didn't show up on the scientific test used. However, I don't think I need to issue a finding on that. Because even if I accept that there was allergen material in the building, that in itself doesn't show the stock was damaged by contamination or pollution. And I haven't seen that it's been shown by any testing or analysis that there is allergen material on the clothing. I don't think it's reasonable to conclude that because a small amount of allergen material was found on the floor of the building, that it follows all, or any, of the stock has been contaminated and therefore damaged by the allergen.

P's report says it's not possible for practical reasons to inspect every item of clothing in the building. I accept that would take a considerable amount of time. However, I haven't seen any evidence from any of the experts that any testing of the clothes has shown any contamination or pollution from an allergen.

Am I persuaded there was damage caused by contamination from smoke and/or allergens?

Whilst E's report concluded it was satisfied the clothing is damaged, I think this is at odds with its findings in that report. Its conclusion seems to be based on the premise that smoke and allergen material entered the building so the stock must be contaminated. However as set out above, I'm not persuaded it's been shown that the allergen, or the smoke, has contaminated the stock.

As such, I don't think it's been shown Mrs P's stock was damaged by contamination or pollution from the fire, and as such, I'm persuaded Aviva reasonably declined the claim. As such whether Aviva could recoup any outlay on the claim from the factory's insurer is irrelevant, as it first needs to be shown there is a valid claim under the policy, and that hasn't been done.

I understand Mrs P is concerned about selling the stock, but I don't think, in deciding Aviva has fairly declined the claim, I can reasonably require it to issue her an indemnity should any purchaser of the stock suffer an allergic reaction. Mrs P's policy already includes public liability insurance, which is designed to support her business with claims from any third parties. I can't see that this would be different to any other claim that might arise but, as with any claim, should an incident occur Mrs P would have to see if the policy, in those circumstances, would respond. I can't make any finding here about something which hasn't yet happened (and may never, given the results of the tests I've reviewed).

### **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 P to accept or reject my decision before 5 June 2025.

Michelle Henderson

**Ombudsman**