

summary of complaint

Mr and Mrs A complain about Aviva Insurance Limited's refusal to indemnify their legal costs in relation to a legal claim against the developer who built their property and their neighbour in respect of the incorrect positioning of a boundary fence between their properties.

background to complaint

Mr and Mrs A bought their property from the developers in November 2004. At that time they had a home insurance policy. In May 2009 they cancelled the insurance and took out a new policy with a bank, commencing in June 2009 which included legal expenses cover provided by Norwich Union (now Aviva).

In April 2011 Mr A made a claim on the policy for legal expenses to pursue action against the developer and his neighbour. The developer appeared to have set out, as part of their driveway, land which was subsequently transferred to their neighbour and included as part of her garden, but was within Mr A's registered title. The dispute had not come to light until August 2010 when their neighbour made demands that they should vacate land forming part of their property but which she believed was part of her title. Aviva asked him to provide further details about the dispute and a breakdown of the value of the claim.

In May 2011 Aviva informed Mr A that it had assessed his claim under the Property Disputes section of the policy and could not provide funding. His claim was not considered to fall within the terms of the policy because the policy did not cover any claim where the agreement was made prior to the inception of the section. He had bought the property in November 2004 but the legal expenses policy was not taken out until 1 June 2009 and therefore, the agreement to purchase the property was not entered into during the period of insurance. In addition, the previous policy details indicated that they had not had continuous cover (the policy did provide cover if you had had continuous cover with a previous insurer). Aviva advised that he should contact his previous insurer for assistance.

Mr A provided Aviva with a letter he had received from his previous insurer confirming that he had held a policy with them from 2 August 2004 until 14 May 2009.

The previous insurer said that if it had been on cover at the time of his dispute (August 2010), it would have covered the claim under its Treating Customers Fairly policy, but as Mr and Mrs A were still in negotiations with the defendants the claim would not have been covered because the policy was in place for legal proceedings; not to investigate or negotiate a claim. As the insured event had taken place in the new insurer's period of cover and Mr and Mrs A had legal expenses cover in place at the time of entering into the contract, they should refer their letter to the bank for them to consider the position further.

Aviva's claims handling agent issued a final response in August 2011 maintaining the decision to reject both Mr A's claims. It said that the fence had always been situated in its current position and it appeared that an oversight in the conveyance or the original registration of the land might be the source of the problem. For a claim to be covered an insured event had to have arisen and the policy only covered incidents when certain legal rights had been infringed, such as damage, nuisance or trespass. Mr A was primarily looking to establish or rectify the legal title to his property or at least defend the allegations of his neighbour that he may be in possession of some of their land. The policy would not extend to seeking a declaration and/or rectification of the boundary to his property, either by HM Land Registry or by an application to court. It was unable to indemnify him for the claim.

Should he establish through the Land Registry or the court that the land belonged to him and the other side had interfered with his established rights, they could then investigate the matter further subject to the occurrence of an insured event.

Mr and Mrs A submitted a complaint form to us dated 30 January 2012.

Our adjudicator considered the complaint and informed Aviva that in his view it could not fairly rely on the timing of the policy to decline the claim because at the time Mr and Mrs A bought their property in 2004; they could not have anticipated that a dispute would arise. It was only when the neighbour complained about the positioning of the boundary line that the dispute arose (in August 2010), and the current insurance policy had started in June 2009. He considered that Aviva should provide legal cover for Mr and Mrs A to pursue the developer. In relation to the claim against the neighbour, he provided Aviva with a copy of a surveyor's report which Mr and Mrs A had obtained and asked it to consider the report in the light of the policy terms.

Aviva did not accept the adjudicator's assessment. It said, in summary:

- In relation to the contract claim against the developer, the policy did not state that the start date for the claim was the date of knowledge of the dispute. It is not relying on the date of occurrence, ie the first date on which the policyholder was aware of the problem; simply when the agreement was entered into. If the customer had not allowed for a gap in his insurance cover, the matter would not have been excluded. They fail to see why they should alter the stance of the policy when the wording is clear in its content and it is not a matter of interpretation.
- The policy clearly states that cover is not available where the agreement was entered into prior to the start of the policy. It is quite common for disputes to arise following the purchase of a property, and if they are to be pursued then there will be reference to the actions and content of the contract ultimately leading to the dispute. Therefore, matters which occurred before the start of the policy where there was not continual cover should not be indemnified.
- In relation to the claim against the neighbour, the wording of the policy in respect of property matters provides cover where there is an interference with the insured's use, rights or enjoyment connected with the property. They have already said that if the boundary is established and thereafter there is interference, they can become involved. The insured consulted a surveyor who said in conclusion on attending the site, that permanent studs within the drive area of the insured's property identify the correct boundary line. However, this does not mean that the other side will not dispute this, and therefore there is likely to be considerable further works in arguing whether the insured has the benefit of the land, as per the likely true boundary position. They do not consider that the report alters their position as it does not adequately confirm the boundary is as the insured believes and therefore the claim still involves establishing legal rights, which falls outside the policy.

The adjudicator decided not to uphold Mr and Mrs A's complaint about the insurer declining their claim for legal expenses to pursue action against the neighbour. On the evidence available, he could not see that an infringement of their legal rights had occurred as they were in the process of negotiating the boundary positioning and the way to affect the new boundary line. He did think cover against the developer succeeded.

my findings

The insured incidents under the policy included Property Disputes, under which Mr A's claim was assessed. The section covered:

- a. A dispute relating to:
 - The interference of **your** use, enjoyment or right over your home
 - Physical damage to **your** home.
- b. A dispute regarding an agreement for the sale or purchase of your main private residence.

The section did not cover any claim *"where the agreement was made prior to the inception of this section unless the policyholder had held this or equivalent cover with **us** or another insurer continuously since the agreement was made."*

The business relied on this exclusion to reject Mr A's claim for legal costs to pursue the developer who sold his property.

I agree with the adjudicator's conclusion that the business could not fairly rely on this exclusion clause to decline Mr A's contract claim against the developer. I do not consider that the small gap of two weeks between the cancellation of the earlier policy and the commencement of the new policy would justify the insurer declining indemnity for the claim.

I consider that it would be appropriate for Aviva to deal with this aspect of the claim in accordance with the remaining terms and conditions of the policy.

A surveyor instructed by Mr and Mrs A made a site visit to their property and in his report he set out his opinion that the boundary line is as indicated by permanent studs within the drive area of the property (which had been installed by surveyors from the developer following a request to resolve the matter).

Aviva did not consider that the surveyor's report confirmed that Mr and Mrs A had a valid claim as to the position of the boundary, and negotiations were likely to continue between them and their neighbour.

Therefore, it was considered that they still had to establish their legal rights in relation to their land and the correct position of the boundary which was not covered by the policy.

I have noted that in the report, the surveyor referred to studs which had been placed in the front and back of the drive following Mr and Mrs A's request to try and resolve the matter and to show the true boundary line. That surveyor had indicated that the original layout between the two properties was incorrect and the developer would rectify the matter. In addition, Mr and Mrs A had made an offer to the neighbour to have a new boundary alignment shown which would result in them losing around a metre width of their current drive, but the offer had been rejected.

The cover under the policy was for costs and expenses incurred in respect of legal proceedings for the pursuit or defence of a claim for damages, specific performance or an injunction dealt with by negotiation, a civil court, a tribunal, arbitration or any other body. It does not appear that at present, Mr and Mrs A's legal rights have been infringed, such that they could pursue legal proceedings against their neighbour in relation to the boundary line. I do not consider that this part of their claim is covered under the policy.

my decision

For the reasons set out above, it is my decision that this complaint is partly upheld. Aviva Insurance Limited should deal with Mr and Mrs A's claim against the developer in accordance with the remaining terms and conditions of the policy.

I do not uphold the part of Mr and Mrs A's complaint about the rejection of their claim for legal expenses to pursue action against their neighbour.

Christopher Tilson
ombudsman