DRN-3431907

The complaint

Mr K complains that Fairweather Insurance Services Ltd ("FIS") mis-sold him a landlord's rent indemnity policy.

What happened

Mr K rents out his property. He approached FIS, his insurance broker, in July 2019 in order for them to source him a landlord's policy, which was to include landlord's legal expenses and rent guarantee cover. FIS sourced a Residential Property Owners policy through Arch – a placing broker – who sold the policy under delegated authority of ARAG Plc (underwritten by Amtrust) and the policy was incepted on 18 July 2019.

Mr K submitted a claim to ARAG on 12 May 2021 for legal expenses and rent indemnity due to his tenant defaulting on his rent payments. He issued a repossession notice through his lawyers, and ARAG provisionally accepted his claim on 14 May 2020. However, it subsequently came to light that the tenancy Mr K had in place was a 'common law tenancy' (whereby the rent exceeds £100,000 per annum) which did not fall within the policy definition of a 'Tenancy Agreement'. So the insurer declined to cover the claim.

Mr K complained that the policy had been mis-sold. As part of his disclosure to FIS, he included a copy of the tenancy agreement which showed it was a common law tenancy, and they were also aware that he required rent guarantee cover for a £120,000 tenancy. So, Mr K submits that FIS were fully aware of the type of tenancy he was looking to have covered under the policy, and says they ought to have known it was not suitable as his contract was neither an assured shorthold tenancy, shorthold tenancy or an assured tenancy.

FIS denied liability, however, as they said they had forwarded all the relevant documentation to Arch, so they say it was Arch who had provided an unsuitable policy.

Our investigator upheld the complaint. He considered that FIS had mis-sold the policy given they ought reasonably to have known that Mr K's tenancy would not be covered. But he didn't think the broker should be liable to cover Mr K's legal expenses/rent indemnity claim, as it didn't appear that Mr K could have sourced an alternative policy elsewhere that *would* have covered his type of tenancy. However, the investigator was satisfied that Mr K would not have taken out the legal expenses/rent guarantee cover if FIS had made him aware that it wouldn't cover his tenancy, so he recommended they refund 50% of the premiums on a joint liability basis with Arch/ARAG.

FIS agreed to settle the case on this basis, but Mr K disagreed. Following the investigator's view, Mr K submitted further evidence to show that he could have taken out an alternative policy that would have covered his common law tenancy. As Mr K disagreed, the matter was escalated to me to determine.

I issued my provisional decision on this complaint in March 2022. I said I intended upholding it and set out the following reasoning:

In this instance, FIS were acting as Mr K's broker on his behalf. I understand that FIS do not consider they are responsible for the mis-selling of the policy, which was provided to them by Arch. However, Arch did not sell the policy directly to Mr K, and he had no direct relationship with them. It was sold to him by FIS. So, they still had a responsibility to ensure that the correct cover was being sold, and I'm satisfied they can fairly and reasonably be held liable for the sale of the policy in these circumstances.

I've considered the basis upon which the policy was sold to determine whether FIS met its regulatory obligations.

FIS's terms of business set out the following:

> *"We will discuss your insurance requirements with you prior to making any recommendation to you. The information provided to you will include a full breakdown of costs and the main policy benefits and exclusions".*

So, FIS state that they recommend policies based on the insurance requirements of the policyholder, and I can see they also told Mr K that they were "comfortable in presenting and recommending the Arista policy". So, I'm satisfied that FIS has sold the policy to Mr K on an advised basis, which means they had a regulatory duty to ensure it was suitable for the demands and needs of the insured (see, for example, the Financial Conduct Authority Handbook, general principles and insurance: conduct of business sourcebook). However, having considered the policy wording, I don't think it was suitable.

The policy terms and conditions cover landlord's legal expenses for repossession, such that they can pursue their legal rights to repossess the property they have let under a tenancy agreement. However, 'tenancy agreement' is defined by the policy as:

> *"**Tenancy Agreement***
> *An agreement to let Your Residential Property*
> 1. *under an assured shorthold tenancy or*
> 2. *under a shorthold tenancy or*
> 3. *under an assured tenancy*
>
> *as defined by the Housing Act 1988 as amended by the Housing Act 1996 and the Assured Tenancies (Amendment) (England) Order 2010 or the Housing (Scotland) Act…"*

FIS were aware that Mr K's tenancy agreement was worth in excess of £100,000 per annum, as they had included this information in their proposal to ARAG:

> *"I have a customer that needs a let property covering which is high net…*
> *Legal required*
> *Rent guarantee £120k per year required"*

I can see that Mr K had also provided a copy of his tenancy agreement to FIS, and had specifically asked if the policy was suitable for his rental agreement, which FIS also asked of Arch on 8 July 2019:

> *"I can get this on cover today, customer has sent his rental agreement and would like it confirming that it is suitable with regards to rent guarantee".*

FIS say they have since researched the matter and have found that a tenancy agreement cannot be an assured shorthold tenancy if the level of rental income exceeds £100,000. So, given that the broker was in possession of Mr K's rental agreement, I'm satisfied that FIS ought reasonably to have been aware that his tenancy would not have fallen into the definition of a 'tenancy agreement' under the policy, because it was neither an assured, shorthold, or an assured shorthold tenancy, and would therefore not be covered under the policy.

FIS say that Arch should have quickly identified that the rental agreement would not be covered under the policy, and I appreciate they were clear in communicating the requirements to Arch. But having clearly known what those requirements were – and as the broker that was recommending the policy to Mr K – they also ought to have checked the terms and conditions to ensure it was suitable for his needs. I do not think a broker exercising the care and skill that most reasonable, prudent brokers would expect, would have concluded that this policy was suitable for Mr K when he did not have a contract that fell within the policy definition of a 'Tenancy Agreement'.

Given that Mr K rented out his property under a common law tenancy, I consider the relevant policy term setting out the definition of 'Tenancy Agreement' to be a significant term that ought to have been very clearly drawn to his attention at the point of sale (assuming FIS were happy to recommend a policy that seemed inherently unsuitable because of it). But I have not seen any evidence that this was highlighted or brought to Mr K's attention by FIS. Had they done so, I do not think he would have agreed to take out this particular policy underwritten by Amtrust and would've likely continued his search for a policy that did cover his common law tenancy, and which would have covered the loss he has since suffered.

FIS have said that they are not aware of any other products on the market that would have covered Mr K's common law tenancy. However, Mr K has since provided a copy of a Rent Protection policy provided by Paymentshield that I can see would have provided legal expenses and rent guarantee cover for his tenancy, as a common law tenancy is specifically included within the definition of a 'Tenancy Agreement' in this policy. I also can't see any obvious reason why Mr K's claim would not have been covered under this policy either.

The policy Mr K has brought to my attention was on the market at the time he took out the Amtrust policy through FIS. So, if FIS had brought the definition of 'Tenancy Agreement' to his attention at the point of sale, I'm satisfied he wouldn't have taken it out, and could have likely found cover elsewhere that did cover his tenancy. In other words, but for FIS's failure to recommend a suitable policy and/or highlight the relevant policy definition, Mr K's losses (i.e. his legal expenses and unpaid rent) would have otherwise been covered.

FIS have argued that it is Arch/ARAG in their capacity as the placing broker that is ultimately responsible for the mis-selling of the policy, as it is they who recommended an unsuitable policy to FIS. However, Mr K does not have any relationship with either Arch or ARAG. He has no contract or agreement with them with regards to the sale of the policy, so he would not be eligible to complain about the acts or omissions of either of these parties with regards to how they sold it to FIS.

Arch's customer in this instance was FIS, so if they consider the placing broker to responsible, then it would be incumbent on them to take legal action in that regard. Mr K was the customer of FIS, who had a duty to ensure he was receiving cover that was suitable and met his needs. It is therefore FIS that I consider to be fully

responsible for the mis-selling of the policy to Mr K, and the losses that have stemmed from their negligence.

On that basis, and in order to put Mr K in the position he would have been but for FIS's negligence, the broker will have to cover the full amount of the claim as well as any reasonably foreseeable, proximate losses that stemmed from the negligence. Therefore, I intend directing FIS to cover the legal costs and rent indemnity Mr K would've had paid if he had been sold the correct policy.

Mr K is still in the process of instructing solicitors to evict his tenants and gain repossession of his property. The possession notice expires in April, at which point court proceedings will be issued for possession. So far, Mr K has incurred around £13,000 in legal costs, and his solicitors estimate that he will incur around £54,000 in total.

So, I first intend directing FIS to reimburse Mr K any legal costs he has already incurred that would have been covered under the policy. Second, due to the ongoing nature of the legal proceedings, FIS will need to appoint a loss adjuster (at their own expense) – who should be chosen and instructed with Mr K's agreement – to handle the claim going forwards as if it had been covered. FIS should then settle the legal expenses and rent indemnity claims in line with the loss adjusters' recommendations.

I appreciate that the Amtrust policy Mr K was sold does not provide cover for common law tenancies. So, I consider it would be fair and reasonable for the claim to be assessed in line with the policy Mr K has said he would have taken out with RSA:

(https://www.paymentshield.co.uk/Media/Default/documents/pdfs/policy-documents/Rent-Protection/PP00682_Rent-Protection-Policy-Booklet_25112019.pdf)

I also accept that FIS has caused distress and inconvenience to Mr K by mis-selling the policy to him, so I further intend awarding £250 compensation in recognition of the impact this has had.

I invited further comments and evidence from both parties. Mr K accepted the proposals set out in my provisional decision, but FIS disagreed. In summary, they've said:

- Arch was not a placing broker; they were the insurer of Mr K's policy and so therefore would've had a direct contractual relationship with him. It was for Arch to ensure the cover was an accurate reflection of the insurance they were asked to provide, and they confirmed that it would cover Mr K's requirements.
- Both the quote and the policy schedule confirm the terms upon which Arch agreed to provide cover. It is these documents that reflect the true intentions of the parties. If Arch did not intend to provide cover for loss of rent and legal expenses, they would not have crossed the boxes for this. Arch agreed to provide cover to Mr K, and it must honour its agreement.
- FIS is not an expert in landlord and tenant law, which was why it provided a copy of Mr K's lease to Arch to ensure it was fully aware of the terms of the lease. FIS therefore acted with reasonable skill and care.
- There is no date or time stamp on the alternative policy booklet Mr K has provided, so it is not sufficient evidence of cover that could have been obtained elsewhere at the time.
- FIS has been informed by Paymentshield that they offer two types of rental protection; one of which is an extension to a comprehensive landlord building's policy, and the second which was a stand-alone product. But neither of these policies

would have provided cover for Mr K's claim to a comparable level of the Arch policy, so it seems unlikely that Mr K would have chosen to purchase either of them given the limitation.
- It isn't possible to determine which terms (if any) Mr K might have secured. And in any event, the rent guarantee cover with Paymentshield would be limited to £15,000 for the comprehensive landlord policy or £30,000 for the stand-alone product.
- Even if Mr K purchased either of these policies, it is not possible to determine if a claim under either of them would have been accepted in any event.

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, and after carefully considering FIS's recent submissions, I've still decided to uphold it.

I've noted FIS's comments about Arch's obligations and responsibility to provide cover, but it hasn't changed my decision that FIS is the party responsible for covering Mr K's claim in the circumstances of this case, as a result of their negligence in the sale of the policy.

FIS have argued that Mr K *does* have a contract with Arch as they were the insurer of his policy. It is actually Amtrust that is the underwriter/insurer of Mr K's policy. But even if Arch were the insurer, Mr K still wouldn't have a contractual relationship with them with regards to the *sale* of the policy, which is what he has complained about. So, in whatever capacity Arch was acting when it provided the policy to FIS, it is clear that they were not selling anything to Mr K directly.

It was FIS that was acting as Mr K's broker in this instance, and they recommended the policy to him. He has subsequently complained that the policy was mis-sold. Therefore, the appropriate respondent to his complaint is the broker that sold it to him. Not an unconnected party who provided it to the broker to sell, of which Mr K had no direct dealing. As I set out in my provisional decision, if FIS are unhappy with the policy they've been provided by Arch, then it will be incumbent upon them to take their own action in this respect.

Mr K does not contend that his claim has been unfairly declined by Amtrust, as it's clear that his common law tenancy is not covered under the policy. FIS submit that both the quote and policy schedule confirm the terms upon which Arch agreed to provide cover, which states that Mr K has cover for landlord's legal expenses and rent indemnity of up to £250,000.

But any claim made under either of these sections will always be subject to the full policy terms and conditions. It does not mean that the insured can avail themselves of cover up to the full limit *irrespective* of the circumstances and whether or not it meets the policy criteria. And I have not seen any evidence to suggest the insurer has since reneged on an agreement to specifically cover Mr K's common law tenancy contrary to what is stipulated in the policy terms and conditions. However, in any event, Mr K is not complaining about the basis upon which his claim was declined, and Arch/ARAG are not party to this complaint. So there is no possible basis upon which they could be compelled to do anything (as FIS have requested) within this decision, which is concerned with the acts and omissions of FIS with regards to the sale of the policy.

I appreciate that FIS did provide a copy of the tenancy agreement to Arch. But I do not consider this would reasonably absolve them of any further responsibility to ensure the product they were providing to their customer was in fact suitable. I also appreciate that FIS are not experts in landlord and tenant law. But given they are in the business of selling

landlord insurance to property owners, I don't think it is unreasonable to expect such an insurance broker to be familiar with the different types of tenancy, so that they can be sure that the insurance they are selling is fit for purpose, as they ought to have done for Mr K, particularly as they sold the policy on an advised basis. So, for the reasons I've already set out above, I'm satisfied that FIS can fairly be held liable on this basis.

In terms of the alternative Paymentshield policy Mr K says he would have taken out, FIS submit that there is no date or timestamp on the policy documentation to show that it would have been available at the time he took out the Arch policy. However, Paymentshield have confirmed to this service that their rent protection and legal expenses policy has been available since January 2018. FIS sold the unsuitable policy to Mr K in July 2019. They say there is no date or time stamp on the policy to verify when it was in force, but the broker appears to have missed the policy edition date featured in the policy document link below (highlighted in bold), as well as a 2019 date that can also be found on the very last page of the document itself. There are two editions of the Paymentshield policy that appear to have been published in 2019, both of which cover common law tenancies for rent arrears and legal expenses on the same terms:

https://www.paymentshield.co.uk/Media/Default/documents/pdfs/policy-documents/Rent-Protection/00606_rent-protection-policy-booklet-RPPS002_**07032019**.pdf

https://www.paymentshield.co.uk/Media/Default/documents/pdfs/policy-documents/Rent-Protection/PP00682_Rent-Protection-Policy-Booklet_**25112019**.pdf

So, I'm satisfied it's more likely that not that the Paymentshield policy would have been available for Mr K to purchase in July 2019, which would have most likely covered his claim.

I appreciate that the policy may not have necessarily provided a comparable level of cover than that which Mr K thought he was getting from the ARAG policy. But I've seen little to persuade me that he would've most likely decided to take out *no* rent protection/legal expenses cover whatsoever if he had been made aware that his tenancy would not be covered by the Arch policy. Even if the alternative cover was perhaps more limited, it is still better than being left with no cover at all. So, I do not accept it's likely that Mr K would have chosen to have no protection in place, rather than taking out an alternative policy that would have covered him at least to a certain extent.

I also understand that it isn't possible to determine exactly what terms Mr K would have been offered, and that the maximum amount he might have been able to claim for legal expenses/rent indemnity under the alternative Paymentshield policy might have been different. But it was precisely for this reason that I said FIS will need to appoint an independent loss adjuster to assess and calculate the claim in line with the Paymentshield policy terms and conditions that would have been in force at the time.

FIS have argued that it isn't possible to say whether Mr K would have had his claim accepted under the alternative policy. But neither have they presented any persuasive arguments to demonstrate that it would have likely been declined. And having reviewed the policy wording, there does not appear to be any obvious reason as to why the claim would not have been accepted. So, in the absence of any evidence to the contrary, FIS (and the loss adjuster they subsequently appoint) will need to proceed on the basis that the claim would have been accepted.

FIS have said that there were different versions of the policy (either combined or standalone) that offered different levels of rent indemnity cover. If this is the case, then Mr K's redress should be calculated in line with the higher level of cover offered in the standalone policy. Indeed, Mr K has said that he was happy with the other elements of cover he had under his

landlord's policy, so it seems most likely he would have purchased the rent protection/legal expenses cover as a separate standalone product in any event.

After having carefully considered FIS's most recent submissions, the conclusions reached in my provisional decision remain unchanged. So, I will be directing the broker to compensate Mr K in line with the directions given below.

My final decision

For the reasons given above, I uphold this complains and direct Fairweather Insurance Services Ltd to:

- Pay the legal costs Mr K has so far incurred towards evicting his tenant.

- Appoint an independent loss adjuster (after seeking Mr K's agreement as to which professional is to be appointed) to manage the claim going forwards as though it were covered under the Paymentshield policy, and settle the legal expenses and rent indemnity claims in line with the loss adjuster's recommendations.

- Pay 8% simple interest per year on any legal costs Mr K has already incurred from the date they were paid until the date of settlement.

- Pay £250 compensation in recognition of the distress and inconvenience caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 18 May 2022.

Jack Ferris
Ombudsman