

## **The complaint**

Mrs B's complaint is about the handling of a claim under her Landlord and Tenant insurance policy with certain underwriters at Society of Lloyd's.

## **What happened**

I issued a provisional decision on this matter in May 2022, the main parts of which are copied below:

"In May 2020, Mrs B made a claim for cover to take proceedings against her tenant for possession of her property, damage to the property and recovery of rent arrears.

The underwriters initially said the claim was not covered. They said the policy excludes events which arise before the policy start date and the tenant had regularly been in arrears with the rent, and was £3,000 in arrears at the time Mrs B took out this cover, therefore the claim would not be covered. After Mrs B complained about this, the underwriters provisionally accepted the claim, as ... [they] accepted the tenant had never been more than two months in arrears before the start of the policy and as such no legal action could have taken place before this claim was made.

The underwriters also expressed concern that the claim had not been reported to them sooner. The policy requires a claim to be notified as soon as possible after a policyholder becomes aware of the event giving rise to the claim. Mrs B was aware of the rent arrears, and indeed had served a notice about them in August 2019, but not notified the underwriters of the claim until May 2020. The underwriters said they would give Mrs B the benefit of the doubt that this had not caused them any prejudice and agreed to proceed with the claim. The underwriters said the prospects of succeeding in the claim would have to be assessed by one of their panel of pre-approved solicitors. The underwriters sent the papers to panel solicitors on 22 July 2020.

Mrs B was unhappy with the communications she had received from the underwriters and said it was not in her best interests to continue any further correspondence with them about the complaint and she would not be participating in the solicitor's assessment. The underwriters took this to mean that she did not want to proceed with the claim and so withdrew instructions from the solicitors.

However, Mrs B says she had sent the email to the complaints department and had not meant for her claim to be held up. After she got in touch, the underwriters confirmed that the solicitors should proceed with the legal assessment. In mid-September 2020, the solicitors said there were prospects of success above 50%. However, the solicitors also said there might be a counterclaim made against Mrs B and this may not be covered by the policy. The underwriters wrote to Mrs B two weeks later to ask her to confirm she'd accept responsibility for the costs of defending any counterclaim the tenant might make.

Mrs B questioned why a counterclaim wouldn't be covered but did confirm she would meet those costs. As the solicitors said the costs of the counterclaim couldn't be separated out from the costs of the main claim, it was decided that the underwriters would meet 50% of the

legal costs and Mrs B would meet 50%. I understand the solicitors then reissued the relevant notices to the tenant and proceedings were issued in February 2021.

The underwriters responded to Mrs B's initial complaint about the delay in progressing her claim in February 2021. They said there was some miscommunication about whether Mrs B had wanted to proceed or not, and it needed confirmation she would fund any counterclaim before it could instruct the solicitors to act. However, the underwriters did accept that there was some avoidable delay on their part and offered £200 compensation for this. This response to Mrs B's complaint was sent in February 2021 (matters have moved on since then, which I will address below).

Mrs B is very unhappy with the underwriter's handling of the claim. She has made a number of submissions, which I've summarised below:

- The underwriters have mishandled the claim, causing significant delays.
- It was important to issue proceedings as soon as the notice served on her tenant expired in September 2020 but this was not done.
- They unfairly asked her to cover the cost of defending the counterclaim when the policy states it covers the costs relating to obtaining possession and rent recovery.
- Her priority was getting possession of her home, not the rent arrears, so the potential counterclaim from the tenant would not have made any difference to this action.
- She had already issued a notice for possession in June 2020 and if acted on promptly could have obtained possession of the property. The claim for rent arrears could have been pursued separately.
- Even after she confirmed three times that she would cover the costs of defending the counterclaim, they did not proceed with her claim for possession.
- She has received significant bills for the counterclaim costs and she would never have agreed to meet those costs if she had known the full implications. She intended to get possession and then make the money claim for the rent arrears. The solicitors knew this and she felt she could trust them but the course of action they took meant the counterclaim was possible and put her in a much worse position.
- The issue with regard to repairs was resolved after a joint survey.
- If she had been correctly informed about the cover earlier on, she could have withdrawn her insurance claim and instructed her own solicitors to get possession of her home, which was always her priority.
- Her policy provides rent indemnity cover and this should have been paid to her when the solicitors confirmed her claim had reasonable prospects of success (*i.e.* September 2020).
- The underwriters agreed to pay for the new notices to be issued (after her original ones had been allowed to expire) even though this is normally not covered. Was this an admission of fault?
- The £200 compensation offered is an insult and doesn't make up for the nights of unrest and stress she has suffered. In any case, it only addressed the initial complaint about delays up to November 2020 and nothing that happened after that date.
- She has also incurred additional, unnecessary financial loss, including months of lost rental income and the cost of issuing notices to her tenant which were allowed to expire.

As mentioned, since the initial complaint was raised with the underwriter and this service, matters have moved on. I understand the tenant left the property in April 2021 with arrears of over £15,000. The tenant stated in defence of the claim for rent arrears that the property was in [a] state of disrepair and did lodge a counterclaim against Mrs B. As the tenant had already left the property, the only claim outstanding was for the rent arrears and the solicitors

advised that while there was a good chance of getting a judgment against the tenant, there was not [a] good chance of successfully recovering any money from the tenant, given they were on means-tested benefits and there was no evidence of any employment or other assets. As a result of this, the underwriters withdrew cover with effect from July 2021.

The underwriters also declined Mrs B's claim for rent indemnity because it said she had not undertaken reference checks on the tenant, as required by the policy. However, it accepted that it should have dealt with this issue sooner, and also told Mrs B that cover was withdrawn sooner, and offered £820 compensation for this.

One of our Investigators looked into the matter. He did not recommend the complaint be upheld. The Investigator thought the underwriters were entitled to refuse to cover the costs of any counterclaim made by the tenant against Mrs B and that their offer of compensation was reasonable in all the circumstances of the complaint. The Investigator also said that much of the complaint is about whether the notices were correct or not and time taken to issue etc which would be a matter for the Legal Ombudsman as they do not related to the underwriter's handling of the insurance claim but rather the solicitors.

The Investigator also said he could only look at matters up to the date of the final response letter of February 2021 and so could not look into the rent indemnity claim, or the decision to withdraw cover, as they will need to be addressed by Society of Lloyd's in accordance with its complaints procedure before we can address it.

Mrs B does not accept the Investigator's assessment, so the matter has been passed to me.

### **What I've provisionally 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.

#### *Should the underwriters cover the costs of the counterclaim?*

Mrs B's policy provides cover for various actions, including repossession, property damage, recovery of rent arrears, and prosecution defence:

*"Following an insured event the insurer will pay your legal costs and expenses up to £50,000 ... subject to all of the following requirements being met ...*

#### *3) your claim*

*a) always has reasonable prospects of success and*

*b) is reported to us*

*(i) during the period of insurance and as soon as possible after you first become aware of circumstances which could give rise to a claim and*

*(ii) within 30 days of rent first becoming overdue if your claim concerns rent arrears."*

It also states:

*"What is not covered?*

*...any civil action brought against you by your tenant."*

The underwriters have relied on this term to refuse cover for the costs of defending the counterclaim brought against Mrs B by the tenant. It is clear that this exclusion means that the costs of defending any stand-alone claims against the policyholder will not be covered. However, the exclusion does not mention counterclaims specifically.

The solicitors thought it was almost inevitable that a counterclaim would be made, as part of the tenant's defence of Mrs B's claim. The solicitors also pointed out that the costs of defending the counterclaim are so entwined with the costs of the main claim that they could not bill for the work involved in defending the counterclaim separately.

Given this, it has long been our position that it is not fair or reasonable to apply the above exclusion to the costs of defending such a counterclaim. I do not think it is fair or reasonable therefore that Mrs B was asked to meet the 50% of the total legal costs.

In my opinion, any legal costs Mrs B has already paid in relation to this claim should be reimbursed to her, together with interest at our usual rate from the date she paid them to the date of reimbursement.

#### Legal advice and actions

Mrs B is also unhappy with the time taken to deal with the legal claim after the solicitors were instructed. She says that she had correctly served a notice for possession in June 2020 and if acted on promptly could have obtained possession of the property in 2020. Mrs B says the claim for rent arrears could have then been pursued separately.

However, I note that the solicitors said the possession claim might fail if it was seen as a retaliatory act in response to the claim for repairs and they thought the June 2020 notice was not valid.

As the Investigator explained, I can only consider what the underwriters have done (whether they have acted fairly, reasonably and in line with the policy terms and conditions) and I have no jurisdiction over the solicitors. They are subject to regulation by their own professional body and I understand Mrs B has made a separate complaint about their handling of the legal claim. I can't therefore look at the quality of the legal advice provided or the conduct of the case, the decisions made by the solicitors about how to pursue the claim, or the time taken by the solicitors to deal with the legal matter. So, even if it would have been possible for the solicitors to have obtained possession sooner, that would not be something I could hold the underwriters accountable for.

#### Claims-handling by the underwriters

Mrs B has also said that she incurred additional financial loss and stress as a result of delays on the part of the underwriters and their handling of her insurance claim. I have therefore considered how the insurance claim progressed.

I do not think it was unreasonable of the underwriters to query the claim at the outset, as there had been arrears previously and a delay in notifying the claim. I think the underwriters were entitled to make the enquiries it did before agreeing to progress the claim. They are also entitled to have a legal assessment of the claim to ensure it has the required prospects of success.

After agreeing to send the claim to the solicitors to assess, Mrs B said in an email dated 20 July 2020 *"please accept this as official notification to inform your solicitor that my agent and I will not be participating in your planned solicitor's assessment...your correspondence is totally unacceptable to me and not in my best interests to continue any further"*

*correspondence with your company in regards to my complaint”.*

Mrs B says this was sent to the customer services team, the claims team referred the matter to the solicitors after this and she had since been in communication to progress her claim, so she does not understand why this was used to withdraw her claim. She says her email meant she would refer her complaint on to [the] Society of Lloyd's.

However, I can understand why the underwriters thought this meant Mrs B didn't want to proceed with her claim. As stated, insurers are entitled to assess if a legal claim meets the policy requirement of reasonable prospects of success, so they could not proceed with Mrs B's insurance claim without the solicitor's assessment. The underwriters withdrew the file on 12 August 2020 and reinstated it after Mrs B contacted the solicitors on 8 September 2020. This caused a delay of almost four weeks in the solicitor's consideration of her claim. However, for the reason given, I do not think this was entirely due to any fault on the underwriters' part and was an unfortunate misunderstanding. I do, however, agree that the underwriters should have notified Mrs B of their intentions.

The solicitors confirmed they thought the legal claim had reasonable prospects of success on 15 September 2020. The underwriters didn't respond until 1 October 2020 and said they would not cover any counterclaim. Mrs B responded the next day confirming she wanted to proceed with the panel solicitors to issue her claim but also querying why her counterclaim costs would not be covered. There was then further delay of around a week before the underwriters replied again and on 16 October 2020 confirmed the panel solicitors could proceed. The underwriters said they needed clear confirmation she agreed to cover any counterclaim costs and she provided this in early December 2020. Mrs B says she thought her previous correspondence had also made this clear.

Mrs B says that her legal claim could have been issued in September 2020 as soon as the solicitors confirmed that she had reasonable prospects of succeeding. I am not persuaded that this is the case. I can see that the solicitors had further queries and were asking for evidence from Mrs B and her letting agent in order to prepare the case, in December 2020. However, it is clear that there were avoidable delays due to the issue about the costs of defending the counterclaim. It is difficult for me to be precise about exactly how much longer it took for the solicitors to proceed with the claim than would have been the case if the underwriters had not declined cover for the counterclaim costs. However, it appears that there were several weeks, up to around three months, delay due to errors on the part of the underwriters.

I have no doubt this caused additional unnecessary stress for Mrs B at an already difficult time. However, I cannot be sure what would have happened had the underwriters given the solicitors the go ahead sooner. The tenant may have left the property sooner than she did but it is impossible to know for sure. I do not therefore consider that the underwriters' delays mean it should reimburse Mrs B for the rent not paid during that period. But I do think that some additional compensation is warranted. In my opinion, compensation should be increased to £600, to reflect the unnecessary distress and inconvenience caused between September 2020 and November/December 2020.

### Other matters

As mentioned above, since Mrs B first brought this complaint, she has also complained about the underwriters' failure to meet her indemnity claim and the withdrawal of cover. She has complained to the underwriters about this but as they are a Society of Lloyd's syndicate, they need to go through the Lloyd's complaint procedure before we are able to. I would suggest she asks Society of Lloyd's to look at this and then she can revert to us if she

remains dissatisfied after that.

### **My provisional decision**

I intend to uphold this complaint

1. reimburse any costs Mrs B has already paid for the defence of the counterclaim, together with interest at 8% simple per annum from the date she paid them to the date of reimbursement; and

2. pay Mrs B the total sum of £600 compensation for the distress and inconvenience caused by its handling of the claim, including wrongfully refusing to pay for the costs of defending the counterclaim. (This is to include the £200 already offered, so if that has already been paid to Mrs B, the underwriters only need to pay the remaining £400. It does not affect the compensation offered for the later matters.)”

### **Responses to my provisional decision**

I invited both parties to respond to my provisional decision with any further information or arguments they want considered.

Society of Lloyd’s has not responded.

Mrs B has responded. She is pleased I have determined that the counterclaim costs should be covered and that I have understood her complaint. Mrs B has also confirmed that the counterclaim is still ongoing with a hearing due to take place in August 2022. Mrs B would like clarification that all the cost of the counterclaim, to the conclusion of the matter, are to be reimbursed to her. She has also made some further points, summarised below:

- the solicitor confirmed on various occasions that, their requests for instructions were not responded to by the underwriters in a timely manner.
- She was not informed her claim had been withdrawn in August 2020. If she’d known, she would have had the option to take a different course of action.
- The first Section 8 notice, for rent arrears, was issued in August 2019, but was allowed to expire in August 2020 by the underwriters.
- The Section 21 notice for repossession was issued in June 2020 and she could have applied to the court for an eviction order in September 2020. This wasn’t done and this notice was also allowed to expire by the underwriters.
- The second Section 8 Notice was served in January 2021. The solicitors issued possession proceedings in February 2021 but the tenant left the property voluntarily in April 2021. Normally a tenant would only leave once a repossession order was obtained. This would normally come with a money judgment for the amount owed and they would then seek to enforce that money judgment. However, as the tenant left the property, she has had to continue the money claim separately and is now left defending the counterclaim.
- Initially, as confirmed by the solicitors, the most important thing was to get the tenant out of the house, so that the rent arrears would stop accruing. However, because of the continuing delays by the underwriters, the tenant did not receive any eviction notices and by the time she left, the rent arrears were over £16,000.
- The underwriters accepted her claim in July 2020 which included, once the solicitors had completed an assessment, the rent indemnity payment. The assessment, and confirmation the case had reasonable prospects, was completed in September 2020. The solicitors told her that once they heard from the underwriters, they would issue the court proceedings but due to the underwriter’s delay, this failed to go ahead.

- The notice regarding repairs was dealt with in 2019 and all repairs carried out. And after the independent survey the tenant bought her rent arrears up to date, making payments in November 2019 and January 2020. She then went into arrears again after this.
- In September 2020 the solicitors stated they could see she'd had all the repairs done and that she would have enough evidence to demonstrate to the court that she had met all her obligations as a landlord and as such would confirm to the underwriters that the claim had prospects above 50%.
- The underwriters failed to pay the rent indemnity when it was due in September 2020. When she raised this later, the claims-handlers said they would arrange for it to be paid but the underwriters then stated they would close that part of the claim.
- If she had received the rent indemnity then there would have been settlement options available to her with the tenant, to prevent any further court action.
- She has never been asked for copies of tenant references but she has been told she would need her tenant's permission to provide on any personal information about her to the underwriters. They should be aware of this.

### **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.

#### *Counterclaim*

As the underwriters have not responded to my provisional decision, I see no reason to change my provisional finding that it should have accepted the claim for costs relating to the counterclaim. The fact that the main claim is no longer being covered (and as stated in my provisional decision, I cannot consider if this is fair or not as it has not yet been considered by Society of Lloyd's) does not affect this. I remain of the opinion therefore that any costs Mrs B has already paid in relation to the counterclaim should be reimbursed together with interest at our usual rate and the underwriters should indemnify the costs going forward until conclusion of the matter.

#### *Handling of the legal claim and the notices*

Mrs B remains adamant that but for delays on the part of the underwriters, she would have been able to evict the tenant and prevented the rent arrears accumulating so much.

I provisionally decided that the delay in July/August 2020 was not entirely due to any error on the underwriter's part, as they thought Mrs B did not want to proceed. But I also provisionally decided that there was around three months delay due to errors on the part of the underwriters, between September and December 2020. However, for the reasons given in my provisional decision, I remain of the opinion that I cannot be sure the tenant could have been evicted any sooner, if that had not happened. The solicitors had further queries and were asking for evidence from Mrs B and her letting agent in order to prepare the case. And it was up to the solicitors to decide when to issue proceedings in reliance of the notices. There is no convincing evidence proceedings could have been issued in September 2020. I therefore remain of the opinion that I cannot reasonably require the underwriters to reimburse the rent due for that period because of these delays (unless it is paid under the rent indemnity section of the policy cover).

However, I do still think that £600 compensation is warranted for the unnecessary stress these delays and the communications regarding the counterclaim caused Mrs B.

### Rent indemnity

Mrs B has again referred to the refusal to meet her rent indemnity claim. As stated in my provisional decision, this part of the complaint needs to be considered by Society of Lloyd's before we can consider it.

In the meantime, in an attempt to assist the parties move this aspect of the complaint forward, I would say that it should be possible to provide proof that relevant references were obtained without disclosing any personal information about the tenant, by redacting any information that is not necessary for the underwriters to see. If the underwriters are not satisfied that the right references were obtained, it will have to consider – with reference to the relevant industry rules and guidance – whether this means it is reasonably entitled to rely on that breach of policy. I would suggest Mrs B asks Society of Lloyd's to look at this (and the withdrawal of cover for the rent claim) and then she can revert to us if she remains dissatisfied after that.

### **My final decision**

I uphold this complaint against certain underwriters at Society of Lloyd's and require them to do the following:

1. reimburse any costs Mrs B has already paid for the defence of the counterclaim, together with interest at 8% simple per annum from the date she paid them to the date of reimbursement;
2. indemnify Mrs B for the remaining and ongoing costs of the counterclaim; and
3. pay Mrs B the total sum of £600 compensation for the distress and inconvenience caused by its handling of the claim, including wrongfully refusing to pay for the costs of defending the counterclaim. (This is to include the £200 already offered, so if that has already been paid to Mrs B, the underwriters only need to pay the remaining £400. It does not affect the compensation offered for the later matters.)

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 22 July 2022.

Harriet McCarthy  
**Ombudsman**