

## The complaint

Mr L complains on behalf of his business, J that its brokers, J M Glendinning (Insurance Brokers) Limited (JMG), failed to provide J with adequate cover which would include 'Accidental Damage', and failed to advise that this was not included within J's policy.

## What happened

I sent the parties a provisional decision in May 2022, in which I set out the following background information to the complaint and my provisional findings.

*J owns industrial buildings and held 'Property Owner's' insurance which was arranged by JMG and its predecessor organisation since 2003. In around 2015 a neighbouring business built a large retaining wall following excavations. In February 2020 a large part of the wall collapsed on to one of J's buildings causing severe damage to the premises and property belonging to J's business tenants who were in occupation.*

*J's insurer appointed loss adjusters who prepared an engineering report. They stated that there was no subsidence or storm damage and the collapse was 'due to accidental damage from collapse of the retaining wall'. The report also stated that, 'the collapse occurred during a period of adverse weather and it is likely the wall was of inadequate design to withstand the hydroscopic forces occurring from the accumulation of rainwater in the ground.'*

*The loss adjusters stated that storm perils were a 'single one off event and not the consequences of periods of bad weather'. And concluded that, as per their report, 'the damage was due to the collapse of an independent wall and this would be regarded as an Accidental Cause.' In response J's insurer said it wouldn't cover the claim.*

*J's representatives complained to JMG saying J's directors were unaware it wasn't covered for Accidental Damage when the wall collapsed and that historically J always had this cover. They said Accidental Damage cover is shown on the 2017 renewal documents, but disappears thereafter without any notice or agreement, or any difference to the sum insured or premium. They said the claim value was in excess of £200,000 and J had effectively been left uninsured.*

*JMG's representatives responded that it had offered a full review of J's policy in March 2017, but this hadn't been taken up by J's directors. They said the policy included specified perils and although an extension for Accidental Damage was available, this wasn't selected by J's directors at inception of the policy and had not been added subsequently. They said it was shown erroneously in JMG's internal documents and those issued to J at renewal.*

*JMG's representatives said Accidental Damage cover wasn't shown in the 2019 renewal documents, but this didn't prompt J to raise the issue and discussions at the time concerned flood cover and premiums. But JMG's representatives also told J's representatives that JMG, 'should have discussed accidental cover with your client and if necessary obtained a policy*

*which included such cover.’ However, it concluded that JMG wasn’t responsible for J’s losses.*

*Mr L, on behalf of J, wasn’t satisfied with this response and brought the complaint about JMG to our service.*

*Our investigator recommended the complaint be upheld. She said that contrary to JMG’s contention J was never made aware that Accidental Damage cover wasn’t included in the policy or that reference to it within the renewal documents was an error. She said JMG had been misleading and unclear about this and the policy had been mis-sold to J. She said JMG should consider settling J’s claim against Accidental Damage cover that it should have held. JMG’s representatives disagreed with the investigator and requested the complaint be referred to an ombudsman. They said the investigator hadn’t considered whether JMG owed J a duty of care, or whether mis-selling was the cause of J’s losses. In reserve JMG’s representatives said JMG owed J a duty to act with reasonable care and skill when obtaining insurance, but J hadn’t selected Accidental Damage cover at inception or subsequently.*

*They accepted this should have been discussed with J and, if necessary, Accidental Damage cover obtained. JMG’s representatives said the wall collapse was due to ‘Storm Dennis’ that occurred just before the damage and so it should be covered under the storm peril in J’s policy. They said winds gusted between 54-62 mph and were accompanied by heavy rainfall, which over the two days, totalled in excess of 50% of the average total monthly rainfall. They said it’s clear the storm caused the damage and so J should claim for this against the insurer. JMG’s representatives said an ombudsman can’t decide a complaint against JMG without assessing the underlying insurance position.*

*Mr L brought a complaint against J’s insurer and the insurer confirmed its rejection of J’s claim for lack of damage related to a storm and that J didn’t hold Accidental Damage cover. Mr L referred this complaint to our service and in a final decision we found that storm wasn’t the cause of the wall collapse. Mr L then continued with his complaint about JMG.*

*JMG’s representatives said that if J’s legal action about the damage from the collapsed wall is settled J isn’t entitled to double recovery for any losses and so any sums recovered via its complaint must be deducted from any award it has obtained. Shortly afterwards, J and the owner of the neighbouring property reached an agreement to settle J’s legal action in respect of a payment of damages and a commitment to rebuild the wall properly.*

### ***My provisional findings***

*This complaint concerns J’s broker, JMG, and so it is JMG’s actions and decisions that I have to consider here. I haven’t considered the actions or decisions of the policy insurer against whom the complaint to this service has been concluded. However, it is worth noting that no liability was accepted by the policy insurer for J’s claim under the storm peril. But the claim has been declined by J’s insurer for lack of Accidental Damage cover on the policy.*

*At JMG’s suggestion, J asked its insurer to indemnify the claim under the storm peril and to consider whether any other cover within its policy might apply to its claim. In response J’s insurer confirmed that the storm peril didn’t apply and as to whether Accidental Damage cover would have applied had it been held by J, it said:*

*‘This was not our insured’s wall that collapsed but the neighbour’s wall that had collapsed on to our insured’s property so cover would have been provided to the insured’s own property had they elected to take out accidental damage cover.’*

*The only expert assessment of the cause of damage to the wall that I have seen is the loss adjusters' report. This states that the collapse of the wall would be regarded as 'an Accidental Cause'. I have seen no reason to depart from this view and I accept what J's insurer says about covering a claim for Accidental Damage were one available to J.*

*I have looked carefully at JMG's handling of J's insurance arrangements to determine if it mis-sold the policy to J, as suggested by Mr L, in particular concerning the lack of Accidental Damage cover, and to see if it has caused J loss. I've also considered if J would have acted differently had JMG provided more or better information about the Accidental Damage cover that might have been associated with J's policy.*

*JMG says that J was never properly on cover for Accidental Damage as its directors didn't request this cover when the policy started in 2003. I have requested JMG provide records from the start of the policy, but they aren't available and so I can't reach a view on this. I note that JMG wasn't the original broker for this policy.*

*JMG has acted as J's broker for a number of years and the sale of policies were provided to J on an advised basis by JMG. This means (under the Financial Conduct Authority's Insurance Conduct of Business regulations) JMG had a responsibility to provide appropriate information at each renewal that is clear and not misleading to enable J to make an informed choice about the cover it required. JMG is required to take reasonable care to ensure the suitability of its advice as J was entitled to rely upon its judgement.*

*JMG recommended the insurance cover to J that it acquired, and it arranged and sold the policy. In order to carry its role out properly JMG needed to gather information from J. JMG's representatives said JMG would usually review J's cover before annual renewal, but it said that due to difficulty in contacting the directors this wasn't always possible. I think that communication difficulties might have been overcome with more effort and I think that JMG itself should have reviewed the cover offered to J or at least been more proactive in making contact in order to meet its responsibilities under the regulations.*

*Mr L said to JMG, 'We have trusted your knowledge and expertise to arrange and manage our insurance for many years. Your failure to properly carry out this duty has left us suffering a significant loss for which we had thought, on the basis of the insurance documentation provided by you, that we would be covered.' JMG recommended policies for J as 'meeting its needs' and set these out as: 'An insurer with a good claims service is necessary. Cover required for the buildings, rent receivable and property owners liability' (Demands and Needs 2011).*

*JMG have acknowledged that some documents sent in 2016, 2017 and 2018 state the policy includes Accidental Damage cover but that the main policy schedule doesn't include this and that this was an error. JMG said the policy never included Accidental Damage cover and the insurance documents should not have included this.*

*I've seen the policy renewal documents for 2016, 2017 and 2018 and they all show cover for Accidental Damage. The renewal documents before this make no reference to Accidental Damage, they just state that J's buildings are covered.*

*JMG's representatives wrote to J and said JMG, 'should have discussed accidental damage cover with your client and if necessary obtained a policy which included such cover.' I think this is an acknowledgement of responsibility on JMG's part of its failure to obtain Accidental Damage cover and its failure to inform J of the lack of Accidental Damage cover and present an opportunity for this to be obtained. JMG's representatives also said JMG owed a duty to*

*act with reasonable care and skill when obtaining insurance.*

*Mr L has confirmed that he believed J's policy included Accidental Damage cover. Having reviewed the evidence including the insurance records I think it was reasonable for Mr L to hold this view. And I think most reasonable people in Mr L's situation would have concluded similarly. Had Mr L known J wasn't covered for Accidental Damage, he has said, and I am persuaded, he would have wanted to take out this cover and would have made arrangements for the same.*

*From what I've seen, I think had the option to include cover for Accidental Damage been put to J it would have been accepted and so JMG's actions affected the exercise of its choice and the cover J held. In conclusion, I currently think that JMG failed to take reasonable care to ensure the suitability of its advice to J as it is required to do. As a consequence, I currently think that J's insurance policy was mis-sold to it by JMG and that it would be fair and reasonable for JMG to step into the shoes of the policy insurer in respect of J's losses.*

*Following our recent request to J for information about the damage it's suffered, I'm aware that its losses remain uncrystallised. When it is ready to do so, J will need to send detailed information about its losses to JMG. JMG will then need to consider payment for evidenced losses connected to the Accidental Damage cover that exceed the settlement payment in this respect that J has already received from neighbouring businesses. If J's losses do not exceed the settlement it received, then there is nothing for JMG to pay. Should J incur insured losses other than those claimable under the Accidental Damage cover in the policy, such as loss of rent, then such claim should be made to its insurers.*

### **My provisional decision and the parties' responses**

I provisionally decided to uphold the complaint and require JMG to put itself in the position of J's insurer and assess its claim with reference to the Accidental Damage cover that was available, but not in place in J's policy. I agreed with JMG's representatives that its insured liability would be subject to all relevant terms and conditions of the policy in place with J's insurer, including any excess. Any additional premium that would have been chargeable to J in respect of Accidental Damage cover would need to be deducted from any related claim.

I also agreed with JMG's representatives that the out of court settlement in respect of J's legal action against its neighbouring businesses should be deducted against any award made as a consequence of this decision. I said it will be open to J to present details of its insured losses to JMG in respect of the collapsed wall and seek recovery of losses in excess of its agreed out of court settlement under the Accidental Damage cover of the policy.

JMG's representatives said its client wants to obtain engineering advice about the wall collapse and has requested further information from J. They said that this information is would enable JMG to investigate matters and provide me with further representations and I should await receipt.

JMG's representatives said JMG owed J a duty of care to act with reasonable care and skill when obtaining J's insurance. They said this duty had been breached, but '*causation is denied*'. They reiterated their position that the wall collapsed due to Storm Dennis and that it '*had stood for c.4-5 years before the date of collapse, with no issues*'. And since the loss adjuster had noted hydroscopic forces from the accumulation of rainwater it is beyond doubt that the storm caused the collapse and cover should have been provided under the policy.

JMG's representatives said it is J's position that the policy would have responded had Accidental Damage cover been in place. But that Accidental Damage cover as described in

the policy wouldn't have offered cover as it excludes damage from a '*latent defect*' or from the collapse of buildings.

JMG representatives said J hasn't provided detailed information about its losses, but its liability is subject to all relevant terms and conditions under the policy, including the policy excess and any additional premium would need to be deducted from a claim.

J responded that its tenant may make a claim for its losses and wanted to know how that would be covered. It said it would pass details of its out of court settlement to JMG's representatives, but didn't think its other requests for information were relevant to the present complaint.

### **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.

I have reconsidered all of the information and evidence connected with this complaint and having done so remain of the view that it should be upheld, and for the reasons set out within my provisional decision. I have separately considered J's complaint about its insurer.

In summary, Mr L said he believed J's policy included Accidental Damage cover and I remain of the view that it was reasonable for him to believe this. Had Mr L known J wasn't covered for Accidental Damage, he has said, and I accept, he would have made arrangements for this cover.

Consequently, JMG's actions affected the exercise J's choice about the cover it held. I remain of the view that JMG failed to take reasonable care to ensure the suitability of its advice to J as it is required to do. And I've concluded that J's insurance policy was mis-sold by JMG and that it would be fair and reasonable for JMG to step into the shoes of the policy insurer in respect of J's losses.

I have considered the points made by the parties in response to my provisional decision. In response to J's point about further claims for its tenant's and its own losses, we have said that any claim should be passed to J's insurer to consider in the first instance.

In response to JMG's representatives point that I should await further evidence about the structure of the wall and potential causes of its collapse, we have said this could only be potentially relevant to J's complaint against its insurer. And our involvement in that complaint ended when we sent out the final decision.

Although JMG's representatives accept that it failed in its duty of care to J, its response concerns the engagement or otherwise of J's insurance policy – issues relevant to J's complaint with its insurer which has been the subject of a separate final decision.

JMG's representatives said it is J's position that the policy would have responded had Accidental Damage cover been in place. The representatives should note that this is the *insurer's* position, as I said in my provisional decision, the insurer has told us, '*cover would have been provided to the insured's own property had they elected to take out accidental damage cover*'. This is only relevant now to any action outside of our service that JMG might wish to take against the insurer.

The representatives have suggested that the Accidental Damage cover wouldn't have engaged due to policy exclusions for latent defect or collapse of buildings. I think they have misunderstood the nature of the Accidental Damage cover as the exclusions to which they

refer only apply if the wall belonged to the insurer's policyholder. As it didn't the cover would have applied to J without exclusions. The insurer has explained that it wasn't insuring the neighbour's wall, but J's risk from it; *'This was not our insured's wall that collapsed but the neighbour's wall that had collapsed on to our insured's property'*. I don't think the insurer's comments leave much room for doubt that J's policy would have engaged had Accidental Damage cover been in place.

I set out in my provisional decision that any settlement of J's claim by JMG should be subject to the terms and conditions of J's policy with its insurer. That and the settlement in resolution of J's legal action remain relevant to the settlement of any claim by JMG as a consequence of this decision.

J's losses remain uncrystallised. When it is ready to do so, J will need to send detailed information about its losses to JMG.

### **My final decision**

For the reasons I have given it is my final decision that the complaint is upheld. I require J M Glendinning (Insurance Brokers) Limited to put itself in the position of J's insurer and assess its claim with reference to the Accidental Damage cover that was available, but not in place in J's policy.

I agree with J M Glendinning (Insurance Brokers) Limited's representatives that its insured liability would be subject to all relevant terms and conditions of the policy in place with J's insurer, including any excess. But without reference to any of the exclusions for Accidental Damage cover within the policy. Any additional premium that would have been chargeable to J in respect of Accidental Damage cover would need to be deducted from any related claim.

I also agreed with J M Glendinning (Insurance Brokers) Limited's representatives that the out of court settlement in respect of J's legal action against its neighbouring businesses should be deducted against any award made as a consequence of this decision.

I said it will be open to J to present details of its insured losses to J M Glendinning (Insurance Brokers) Limited in respect of the collapsed wall and seek recovery of losses in excess of its agreed out of court settlement under the Accidental Damage cover of the policy. Losses incurred under any other insured cover within the policy should be presented to J's insurer in the first instance.

Under the rules of the Financial Ombudsman Service, I'm required to ask J to accept or reject my decision before 1 August 2022.

Andrew Fraser  
**Ombudsman**