

## The complaint

Mr M is unhappy with Ocaso SA, Compania de Seguros y Reaseguros following its response to his claim on his legal expenses insurance.

All references to Ocaso include its agents.

## What happened

Mr M bought his house in May 2015. He took out insurance with Ocaso in August 2016. In September 2016 he discovered workmen in his garden digging holes for a new fence. This was shortly after the neighbouring property had been sold and he had a new neighbour. The holes being dug didn't follow the line of the existing fence but were on his side of the fence. Following a discussion between the neighbours a third party came to the properties and looked at Mr M's title deeds. In the third party and Mr M's opinion these showed not only were the new holes trespassing onto Mr M's land, but the old fence had done so too. The old fence appears to have been erected in 2010/11.

Mr M called Ocaso in January 2017. Mr M says Ocaso said it could only cover his legal expenses when it was ready to go to court. Mr M instructed a firm of solicitors I'll call S in 2017. S wrote to Mr M's neighbour and told her that there appeared to be a trespass. Then at the beginning of 2018, the neighbour removed the fence that was there and erected a new fence. This fence didn't follow the line of the fence that was removed exactly. Mr M called Ocaso in August 2018 to advise he had now established ownership of his land. Ocaso appointed one of its panel solicitors to confirm whether the claim had reasonable prospects of success. This was confirmed and by March 2020 matters were at the point of issue. At this point Mr M wished to exercise his freedom to choose his own solicitor. The panel solicitors confirmed at that time the claim continued to enjoy prospects of success. Mr M – who was frustrated by the panel solicitors lack of responsiveness – wished to instruct S. S was sent the Claims Management Report (CMR) to complete. S returned the signed terms in June 2020, but it was when the completed CMR was returned to Ocaso in November 2020 that Ocaso raised concerns about cover for the claim.

Ocaso said Mr M's policy requires that the date of occurrence arises during the policy period. The date of occurrence is defined in the policy as: *the date of the event which may lead to a claim. If there is more than one event arising at different times from the same cause, the date of occurrence is the date of the first of these events.* Based on the information from Mr M, Ocaso determined the trespass was in place prior to the point Mr M moved into the property in 2015, as such, the date of occurrence for the purpose of cover, Ocaso said would be the date Mr M moved in. And Ocaso says this is regardless of whether Mr M was aware of the trespass or not. As Mr M wasn't insured with Ocaso at this date it withdrew its cover for his claim. It offered £300 compensation to him for the distress and inconvenience caused to him.

The investigator issued an initial view on the case. In it she said while Ocaso is entitled to continuously review on-going claims, something as significant as the date of occurrence, is one in which she considered should've been established and confirmed much sooner than it was. The claim start date was August 2018, but the date of occurrence wasn't reviewed and

confirmed until December 2020. This she believed was a major failing on behalf of Ocaso and came at an important stage in Mr M's claim where legal proceedings were ready to be issued. In addition, she didn't consider Ocaso's decision concerning the date of occurrence to be fair and reasonable in the circumstances. She said this because while the date in which the fence was first incorrectly positioned (roughly 2010/11) was some years before Mr M moved into his property in May 2015 and the policy began in August 2016, his knowledge of this was completely unknown and therefore he was unaware of any pre-existing legal dispute in relation to the fence at the time his policy began.

She thought it was unreasonable for Ocaso to withdraw cover for Mr M's claim when he was not able to make this any earlier due to him being unaware of the original date of occurrence and his subsequent right to claim.

She recommended that DAS reinstate cover for Mr M's claim and provide funding as required under his policy. She considered the £300 compensation to be reasonable in respect of the customer service he had received and made no further award in this regard.

Mr M did not accept the investigator's view. He said the fence in question that constituted the trespass was erected in 2018. He didn't think it was practical to reinstate the cover because S had had enough of Ocaso who only paid one tenth of the bill he invoiced them for work already done. He couldn't face having to deal with one of Ocaso's panel solicitors. He would prefer financial compensation and doesn't think £300 is in any way acceptable.

Ocaso also didn't accept the investigator's view. It said Mr M does not have a date of knowledge policy but a date of occurrence policy. The policy doesn't cover a dispute that has arisen prior to the start of the policy, whether a policyholder knows about it or not. It agreed with the investigator's view that its failure to identify the correct date of occurrence at the outset was significant but didn't think such an error should entitle a policyholder to further cover that they are not entitled to.

It also highlighted that it had now discovered that Mr M's legal cover didn't commence until January 2017 and not as it had previously thought August 2016. So, it would indicate there was no legal expenses cover available on the policy when Mr. M reported the claim to Ocaso in January 2017.

The investigator issued a second view. In it she said she acknowledged that Ocaso had already offered £300 compensation but given the significant delay she considered Mr M had suffered a higher level of distress and inconvenience than would normally be expected. She noted that while Mr M hadn't had the outcome, he intended in respect of his trespass claim, he has still had the benefit of legal cover and had the opportunity to pursue his neighbour albeit without success. And so, having taken everything into account, she recommended that Ocaso increase its compensation offer to £600.

Mr M didn't agree with the investigator's second view. He said Ocaso wasted two and a half years causing him no end of stress. Also because of that wasted two and a half years his case became weakened as his neighbour's length of occupation was increased (with implications for an adverse possession claim). He says the service he did get used up so many days of his time in pursuing a response from the panel solicitor that £600 wouldn't even pay him the equivalent of minimum wage. He says he is left in a situation where he has lost his land, his time, his money (spent on S doing the preliminary work) and the case because S has basically said he doesn't want to deal with Ocaso anymore. He says it would cost him tens of thousands of pounds to pursue the case now. He maintains the old fence has nothing to do with his claim and was only submitted as background information. He insists the incident giving rise to his claim – the erection of a new fence- took place in 2018.

S also told us that he felt battered by Ocaso's incredibly unhelpful and obstructive conduct throughout.

Ocaso also didn't accept the investigator's second view. It strongly refuted Mr M's allegations about its conduct. It also thought Mr M was misrepresenting the situation, stating the dispute relates to a fence erected in 2018. It accepted the claim relates to a fence, but also allegations of a historic land grab surrounding the fence and its placement, allegations made long before 2018. Furthermore, the claim was brought to Ocaso in January 2017, so it does not relate to an issue arising in 2018. It didn't understand the investigator's rationale for increasing the compensation payable to Mr M.

### **My first provisional decision**

I set out my thoughts in a provisional decision, in it I said:

*Following questions, I raised with Ocaso, it has confirmed that it was wrong to say that Mr M didn't have LEI cover until 2017. It has now confirmed he had cover from August 2016.*

*I think to determine the case I need to think about what Mr M could reasonably have known when he took out the policy in August 2016. I think I could fairly say the claim was probably declined reasonably if I think Mr M could reasonably have known by then that:*

- *the boundary had been moved prior to his purchase; and / or*
- *more generally, there was (or was likely to be) some dispute involving the boundary; and / or*
- *that there might be an ongoing trespass onto their land.*

*Mr M describes what he owns – based on his deeds - as a simple rectangular garden. S told Ocaso that the fence that was removed in 2018 zig-zagged more than the fence that replaced it. When Mr M was buying his house, I would expect that he would have been sent a title plan. I think seeing a plan which shows a simple rectangular garden - when the garden he was viewing wasn't a simple rectangle - should have alerted him to the possibility that the boundary on the property he was buying had been moved. I think he should therefore have made his conveyancer aware of the difference and enquiries should have been made at this point.*

*Even if he didn't notice the issue when he was buying the property, I think he should have realised soon after moving in. So, I think by the time he took out his policy with Ocaso, Mr M ought to have known that the boundary had been moved prior to his purchase; and more generally, there was (or was likely to be) some dispute involving the boundary; and that there might be an ongoing trespass onto their land.*

*From what I've seen it is not clear whether or not Mr M realised that the fence and the title plans didn't 'match' before his insurance policy with Ocaso had been taken out. In an email to Ocaso he said: The previous owner/inhabitant was disabled, exceedingly frail and in the last months of her life in 2015 when I moved in hence ..., no approach was made to her to correct the fence line ...I simply made an enquiry in 2017 regarding my policy as to what was covered IF any incidents arose as I considered it was a possibility that the new owner may not correct her fence line. This suggests to me he did know the fence was in the wrong place before his new neighbour moved in. But I don't need to make a finding that he did know, I just need to think that he ought to have known that there was an issue regarding the boundary before he took out his policy. And as I've set out above, I think he ought to have known and therefore Ocaso wasn't unreasonable to decline his claim.*

*I'm not persuaded that the change of ownership of the neighbouring land means that it would no longer be fair to decline his claim. A court may take a different view given that any action*

would be against a different person as the trespass was by a different person. But we have a jurisdiction which requires us to look at what is fair and reasonable in all the circumstances of the case. And here, for the reasons I've set out above I think Mr M ought to have known that he had an issue with his boundary and there might be ongoing trespass prior to his taking out the policy with Ocaso and this means I think that Ocaso wasn't unreasonable to decline his claim.

Mr M insists the incident giving rise to his claim is the erection of a new fence. I think if this new fence represented a significant increase in the area in dispute then I might have agreed with him that he should be covered, at least for a claim relating to the increased 'land grab'. But S has referred to the new fence as being in a 'slightly different position' to the old fence. S told Ocaso that Mr M couldn't tell if the new fence encroached "further" onto his land (as the old fence zig zagged more) but he can say that it is in a slightly different place to the previous fence. S also – in the CMR – said the boundary was to be restored to the original straight-line position. Thus, showing that Mr M isn't seeking things to be returned to the 2018 position but to the original boundary. Given the aim of the proceedings was to put things back to the title position I don't think I can fairly say that the incident giving rise to the claim was the erection of the new fence. Instead I think the erection of the fence was an additional incident in an on-going boundary dispute.

I do, however, think that Ocaso did let him down by not declining the claim earlier. The claim could have been turned down earlier if the right questions had been asked at the start. It could also have been turned down earlier if the claim had been managed without delays. I can see that Mr M did have to chase both Ocaso and the panel solicitors on a number of occasions. And Mr M expressed his dissatisfaction about delays to Ocaso before his claim was declined. I can also see Mr M's correspondence with Ocaso shows that he was getting increasingly frustrated by Ocaso – he describes himself as 'ground down' by the process and finding it painful. He also mentions the effect on his health of having the matter hanging over him.

As Ocaso's panel solicitors are an independent law firm I cannot hold Ocaso responsible for any poor service from the panel solicitors, but I would expect Ocaso to intervene to support Mr M if there were a lot of delays. I don't think it did enough to help him either by engaging with the claim or by ensuring the panel solicitor responded in a timely manner. I think given the effect on Mr M the £600 suggested by the investigator seems fair. Mr M says the £600 suggested wouldn't even compensate the time he has spent at the rate of the minimum wage. I don't think I have seen evidence which suggests Mr M would have spent more than 60 hours on this dispute prior to the claim being declined. But even if I did, we don't look to compensate complainants based on a wage they might have earned. Instead we look at the effect on the complainant and I think £600 seems reasonable given the evidence I have seen for the distress and inconvenience caused.

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

Mr M did not accept my provisional decision. He said not only had Ocaso's actions wasted his time but because of the delays his neighbour could now if he went to court claim adverse possession. Therefore, he said he could no longer pursue his neighbour because it was now too risky for him or another insurer to take on. He said he had lost his land and the money he paid to his solicitor initially.

He also thought that what I said about the fence having previously zig zagging makes no sense as the zig zag may have meant that he may have gained land where it went away from his property in the same way he lost it where it came toward. So, he disagreed completely with the conclusion that he should have known trespass had already occurred.

Moreover, he said the insurers covered him knowing the previous fence was not in a correct straight line and the point was when the owner went to correct it, according to the survey and deeds, they knowingly trespassed.

Ocaso accepted the provisional decision.

### **My second provisional decision**

I issued a second provisional decision. In it I said:

*Mr M has said that although the fence when he bought the property zig zagged – when it should have been straight – because he may have gained as well as lost he shouldn't have known there was a trespass when he bought the property. That wasn't the test I set out in the provisional decision. In the provisional decision I said that*

*I think I could fairly say the claim was probably declined reasonably if I think Mr M could reasonably have known by then that:*

- *the boundary had been moved prior to his purchase; and / or*
- *more generally, there was (or was likely to be) some dispute involving the boundary; and / or*
- *that there might be an ongoing trespass onto their land.*

*As the fence zig zagged when it should have been straight, I think Mr M knew or ought to have known enough that he should have made enquiries when he was buying his house. And even if he didn't notice the issue when he was buying the house, I think he should have realised soon after moving in. So, I think by the time he took out his policy with Ocaso, Mr M ought to have known that the boundary had been moved prior to his purchase; and more generally, there was (or was likely to be) some dispute involving the boundary; and that there might be an ongoing trespass onto their land. The fact that where the fence was may have resulted in him gaining some land and losing other bits isn't really relevant because the zig zag should have put him on notice that there might be a problem.*

*Therefore, I think it was reasonable for Ocaso to decline the claim. But I still think it took too long to tell him that it would decline the claim.*

*Mr M feels that due to the time that has elapsed – which he thinks means that his neighbour could claim adverse possession – his case is weaker. He says: I cannot pursue it without massive risk and indeed where other insurers wouldn't touch it with a bargepole now adverse possession has been enabled as an argument.*

*So, I need to consider what I think would have happened if Mr M had discovered that he wasn't covered by Ocaso in a more-timely manner. I think it is most likely that he would have taken advice from a solicitor and probably had his solicitor write to his neighbour to try to resolve things. As I think he would have obtained legal help even if Ocaso had told him very early on that he wasn't covered I can't say Mr M has suffered any loss due to him paying for the preliminary legal work.*

*I think if he had taken legal advice - in the knowledge he didn't have insurance - he would have concluded he didn't want to pursue the litigation in the circumstances of him either having to self-fund the costs or pay for an after the event policy (assuming he could get one). I say this for two reasons.*

*First, disputes involving boundaries can be very expensive. Mr M has told us that he doesn't have the money to pay for the costs of going to court. He also strikes me as a sensible and pragmatic man and the land in question doesn't seem to be so significant that I think it is*

*likely Mr M would have taken the risk even if he had the money. I don't think the land is so significant because Mr M was happy to buy the property in 2015 and S has said that the fence in 2018 was positioned such that Mr M couldn't tell if the new fence encroached "further" onto his land. In addition, when he came to this service, he said that he wanted compensation of £10,000 and this was to cover him for his time, the stress he was caused and the value of the land he thinks he has lost. He did not want an order that Ocaso be made to pay his legal costs to pursue the action. All of this together suggests to me he would not have pursued his dispute regarding the fences beyond preliminary legal advice if he knew Ocaso wouldn't cover him.*

*Secondly, although Mr M says that he can't pursue the claim now because of the potential adverse possession claim that doesn't seem right to me. S said that he was confident that any adverse possession claim could be rebutted. Mr M has previously described the adverse possession claim as being weak which suggests to me that his decision not to pursue the case when his claim was declined by Ocaso wasn't because of the adverse possession claim risk. It also seems likely given the change of ownership of the properties (and the fact the previous owner of the neighbouring property has died) that Mr M's neighbour wouldn't be able to provide the necessary evidence to demonstrate ten years of adverse possession. So, I don't think the adverse possession claim is the real reason Mr M isn't pursuing the claim. I think he isn't pursuing it because he was only interested in pursuing the claim if Ocaso was paying the costs.*

*Therefore as I think if Ocaso had told him sooner that he wasn't covered, he would have taken advice and then concluded he didn't want to pursue litigation against his neighbour, I don't agree that he has lost out financially as a result of the delay.*

*I do, however, still think he has reason to feel let down by the delays. And that the £600 I set out in my provisional decision remains fair compensation for his distress and inconvenience.*

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

Ocaso accepted my second provisional decision. Mr M didn't respond.

## **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.

As neither party have asked me to consider anything further following my second provisional decision, I see no reason to change my mind. I therefore confirm it here now.

## **Putting things right**

I think Ocaso should pay Mr M £600 for the distress and inconvenience caused to him by its handling of his claim.

## **My final decision**

I uphold this complaint and order that Ocaso SA, Compania de Seguros y Reaseguros pay Mr M £600.

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

Nicola Wood  
**Ombudsman**