

## **The complaint**

Mr M complains Allianz Insurance Plc wrongly withdrew funding under his legal expenses insurance policy to pursue a claim against his neighbour in connection with access to his property.

Mr M is represented by a family member in relation to the insurance claim and his complaint to the Financial Ombudsman Service but, for ease, I refer to Mr M throughout.

## **What happened**

In 2009 Mr M bought a property at auction. He was granted permission to extend the property and, after obtaining planning permission, began works in around August 2021. Mr M's neighbours, who had objected to the works, obstructed access over land to the rear of his property. That meant he wasn't able to take delivery of materials for the work he planned to carry out.

Mr M said he owned or had right of access over the land in question. The neighbours disputed that. Unfortunately, relations between Mr M and his neighbours deteriorated. Mr M's health was affected, and his property suffered damage due to water ingress when he couldn't complete the works.

Mr M had legal expenses insurance (LEI) as part of his home insurance policy. Allianz were the LEI insurers. Other parts of the home insurance were provided by other insurers. At the beginning of September 2021, Mr M made a claim through his brokers under the LEI to cover his legal costs of pursuing a claim against the neighbours.

Allianz considered the claim under the property disputes section of the LEI policy. In mid-September 2021 they instructed panel solicitors to advise. Allianz told Mr M the solicitors would review the entire claim and that instructing them shouldn't be construed as acceptance of the claim. They said the solicitors would only pursue the claim if they were satisfied that the prospects of success for the claim exceeded 50% and the claim met the remaining terms and conditions of the policy.

The solicitors issued their advice on around 4 November 2021. They said Mr M would need to establish ownership of the land his neighbours were obstructing or that he had a legal right of way over the that land. If he could do that, he might be able to pursue a claim against the neighbour for trespass and/or nuisance.

The panel solicitors thought the title deeds showed the neighbour owned the disputed land. But Mr M had a reasonable chance of establishing ownership through adverse possession. An alternative claim could be made that Mr M had a right of access, although that claim didn't have reasonable prospects on its own. If either could be established, a claim for trespass or nuisance would have reasonable prospects. But those claims on their own were unlikely to succeed.

Allianz considered Mr M's claim to take action to establish adverse possession and rights of access fell outside the terms of the LEI policy. They said the policy covered defending

existing property rights, but not establishing new ones. And since any claim for nuisance or trespass didn't have reasonable prospects of success on its own, the policy conditions for making those claims weren't met.

Mr M made a complaint which Allianz rejected. He brought his complaint to the Financial Ombudsman Service in February 2022. He said the delay in progressing the claim against the neighbours meant the works hadn't been completed and the property couldn't be let. Mr M had suffered a financial loss as a result. And he'd been caused distress by the neighbours. The property, which he had been living in, had been without sanitation since around April 2021.

The situation developed after Mr M had brought his complaint to us. His own solicitors advised him in March 2022. Allianz said their advice acknowledged he didn't have any rights over the disputed land. He might have an easement, but it was felt unlikely. Whilst there were 55% prospects of success in bringing a claim for trespass and nuisance, that claim depended on establishing legal rights over the disputed land. So, their position remained unchanged.

In April 2022 Mr M sent an email to Allianz from his solicitors which said there was an apparent encroachment over a sliver of land Mr M owned and on which the neighbours had placed items. Allianz offered to fund one third of the costs of making the claim on the basis there were three parts to the claim of which two were about establishing ownership or rights over the disputed land and one was trespass – provided the trespass claim remained live and had reasonable prospects of success.

Mr M wasn't happy with that and considered Allianz should fund the claim in full. He said too that since the rates Allianz were prepared to pay his solicitors were lower than the rates they charged, the offer didn't amount to one third of the costs likely to be incurred, but less than 20%. He rejected the offer.

Mr M also said he'd taken out extra cover which he understood protected him against damage or unforeseen problems occurring during the works. Allianz said that wasn't to do with the LEI policy. They pointed out to Mr M the claim had come to them through brokers. They understood the buildings insurers may have received a claim for the property damage.

Our investigator took the view Allianz should cover the full legal costs of pursuing a claim against the neighbours. And she said they should pay £500 compensation for distress and inconvenience. Allianz didn't agree. So, Mr M's complaint was passed to me to decide.

I recently issued a provisional decision an extract of which follows:

***“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.*

*I am sorry to hear of the problems Mr M has had in accessing his property, the difficulties with his neighbours and the impact the situation has had on his health. I may not mention here all the detailed information he and Allianz have helpfully provided to explain things. No discourtesy is intended by that. It simply reflects the informal nature of the service we provide.*

To be clear, I'm only considering Mr M's claim under his LEI policy. The LEI insurers at the time he made his claim and who have responded to the complaint are Allianz. As Allianz have explained, Mr M may have cover under other parts of the home insurance policy with a different insurer for damage that's occurred to the property. But he'd need to discuss that claim with his broker or the property insurers direct, not with Allianz.

Based on what I've seen so far, I've come to broadly the same outcome as our investigator. But my reasons are different in some respects. So, I'm issuing a provisional decision to give the parties time to comment or provide further information if they wish.

I'm conscious the complaint Mr M made and brought to us in January 2022 is about Allianz's withdrawal of cover following the panel solicitors' advice in November 2021. However, I think it's reasonable to look at what happened afterwards as it's part of an ongoing situation and Allianz have had the chance to consider and respond to the issues.

We expect insurers to deal with claims fairly and promptly, and not to decline them unreasonably. The starting point for considering Mr M's complaint, against that background, is the terms and conditions of the LEI policy. The policy provides cover for reasonable legal costs for the insured incidents set out in the policy up to a limit of £100,000 and subject to the definitions, terms, conditions and exclusions set out in the policy.

At its heart, Mr M's claim is that his neighbours are trespassing on land which he owns and preventing access to his property. So, I think Allianz rightly considered Mr M's claim for cover under the section of the policy entitled '**Your Home**'.

That section says Allianz will cover

**'Legal costs** incurred in bringing about legal action due to any infringement of **your** legal rights to own and occupy **your property**. The insurer will provide cover for legal costs incurred by **you** in taking legal action in connection with:

...

2. infringement or encroachment of **your** use, enjoyment or rights over the **property**
3. nuisance or trespass disputes which occur at or in respect of the **property**'.

**'Home'** is defined as '**Your** private dwelling in the **United Kingdom** as detailed on **your** Policy Certificate (this includes **your** domestic outbuildings used in connection with the dwelling and any private garage or outbuilding belonging to **you** within 100 metres of the dwelling used by **you**)'.

**'Property'** is defined as '**Your** permanent primary residence within the **territorial limits**'.

It is a condition of the policy that Mr M's claim should have reasonable prospects of success. **'Reasonable prospects'** means

**'A 51% or greater chance that you will recover losses or damages (or obtain any other legal remedy that we have agreed to, including an enforcement of judgement), make a successful defence or make a successful appeal or defence of any appeal in your pursuit of civil proceedings or criminal proceedings'**.

Following notification of the claim, Allianz passed it to their panel solicitors for advice on policy coverage and the prospects of a successful claim being made against the neighbours. That was in line with the terms of the policy which said Allianz could appoint panel solicitors up to the point when it became necessary to issue legal proceedings. Mr M could choose to appoint his own solicitors then if he wished. But things hadn't reached that stage.

*It's reasonable for an insurer to instruct lawyers in relation to policy cover and whether a claim has reasonable prospects of success. They aren't lawyers and it's reasonable for them to seek professional advice. Provided the solicitors they instruct have the necessary expertise and experience to look at the claim, and the advice they give isn't obviously wrong, it's reasonable for the insurer to rely on the advice.*

*Here, the panel solicitors were appropriately qualified, and I don't think the advice they gave was obviously wrong. I'm not aware, for example, of any factual mistakes in the advice that Allianz ought to have noticed. I acknowledge Mr M felt an inspection of the original title deeds held by the bank could have been carried out by local solicitors. And I'm aware Mr M's own solicitors said later the title deeds showed a sliver of land at the rear of the property clearly belonged to him. But, the panel solicitors had considered the title deeds.*

*Based on the panel solicitors' advice I think it was reasonable for Allianz to conclude the policy didn't provide cover. They understood Mr M didn't own the disputed land. There was no cover to pursue a claim to establish he did. And any claim for trespass or nuisance didn't meet the policy condition of having reasonable prospects of success unless he could prove ownership.*

*But Allianz discussed things with the panel solicitors in January 2022 to check their understanding. The solicitors told Allianz that it could be argued the claim Mr M could make against the neighbours wasn't, of itself, a claim for adverse possession (or, in simple terms a claim to establish ownership). The claim for adverse possession was "a mechanism" that had to be used to prove the trespass.*

*The panel solicitors had said the prospects of successfully pursuing the adverse possession claim were reasonable, and that, if it did succeed, a trespass claim had reasonable prospects too. On balance, I think it would have been fair for Allianz to have set aside a strict interpretation of the policy terms and continued to fund the claim, subject to the remaining terms and conditions of the policy, given the prospects of success overall were reasonable. If they'd done that, the panel solicitors could then have got on with the case.*

*Allianz looked at the advice Mr M's own solicitors provided in March 2022 and reconsidered their position. Mr M's solicitors' advice was broadly similar to that of the panel solicitors in relation to showing Mr M owned the disputed land. They said the prospects of establishing that were around 55%. But to have prospects of successfully making a claim against the neighbours for trespass and nuisance it would be necessary to establish ownership first. They mentioned, however, it was clear that it was always intended that there would be some rear access to the property and that the plan in one of the transfer documents suggested the access was around two metres wide. Prospects of establishing trespass were put at over 50%.*

*Allianz said there was nothing in the advice that changed their mind about what could be covered under the policy. I think they overlooked the reference to the sliver of land. It was clarified in an email Mr M forwarded from his solicitors in late April. Following that, Allianz agreed to fund one third of the solicitors' legal costs subject to certain conditions. But the offer appears to have been unrelated to the sliver of land. It was made on the basis Mr M wished to pursue three separate issues of which one related to trespass.*

*I can understand Mr M was disappointed with Allianz's initial decision given the difficult circumstances he was in and the effect they were having on his wellbeing. I acknowledge Allianz continued to correspond with Mr M quite extensively and they did so in a reasonable way. But I don't think their initial conclusions about policy cover were fair and reasonable.*

*And they missed an opportunity to look into things more closely when they got Mr M's solicitors' advice.*

*I'm aware there's been some later confusion about which claim Mr M might wish to pursue. But I think it's clear enough what he was claiming for initially – that there was interference with his property rights giving access to the rear of his property for deliveries for the works he was carrying out. And, for the reasons I've explained, Allianz ought to have agreed to cover the claim in full, subject to the remaining terms and conditions of the policy, after they'd discussed things with the panel solicitors in January 2022.*

*In the circumstances, I think Allianz should:*

- 1. Treat Mr M's claim as if cover had been accepted in January 2022.*
- 2. Meet the legal costs Mr M has incurred since then in full – they could have been avoided if they'd accepted the claim.*
- 3. Deal with Mr M's claim in line with the terms of the policy from now on. Allianz are entitled to appoint panel solicitors to represent Mr M until it becomes necessary for proceedings to be issued. If matters reach that stage, Mr M will be able to instruct his own solicitors subject to the terms and conditions of the policy, which will include Allianz agreeing terms of engagement with those solicitors direct and the hourly rates they will pay.*
- 4. Compensate Mr M for the distress and inconvenience he's suffered. I'm aware Mr M's health was already poor. The withdrawal of LEI cover, and the position taken in relation to policy cover, have delayed the action against the neighbour. I accept that's had an effect on Mr M's wellbeing.*

*Fortunately, he hasn't had to engage in corresponding with Allianz, the solicitors and the neighbours as his representative has taken care of that for him. But he's nevertheless had to put up with the actions of his neighbours over several months after Allianz withdrew cover. I think the uncertainty of knowing if he'd be funded to pursue his claim against them will have added to the stress he's been under.*

*Based on what I know so far, I think the £500 compensation our investigator recommended is fair compensation for the distress and inconvenience he's suffered.*

- 5. I understand the claim for adverse possession may now be out of time as far as an application to the Land Registry is concerned. I understand Mr M was made aware of the deadline but given his personal circumstances I appreciate why he wasn't able to fund the application himself or pursue it in person. If things had gone as they should have, Allianz would have funded that application. If Mr M is now prevented from pursuing his claim at court entirely then Allianz should instruct a barrister to consider what he would most likely have recovered had it been pursued and pay Mr M for the value of that directly."*

## **Developments**

Mr M accepted my provisional decision, although he's asked whether the costs his representative has incurred can be paid by Allianz.

Allianz have rejected my provisional decision and made several points in response, which I'll summarise:

1. Mr M needs to establish rights over land before he is entitled to policy cover. The policy doesn't cover the cost of that work, in line with other legal expenses insurance policies. Allianz have pointed to two previous Financial Ombudsman Service decisions where that's been recognised. Rather than asking them to set aside a strict interpretation of the policy terms, Allianz say I am asking them to disregard the purpose of the policy.
2. Their panel solicitors addressed the land retained by the property now owned by the neighbours over which they'd denied access. They advised Mr M wouldn't be able to prove he owned it and had no existing legal rights over it. I've misunderstood what the solicitors said in January 2022 about the adverse possession application. It's a separate legal issue to the trespass claim. The solicitors clarified in early February 2022 that Mr M would need to establish a legal right over the piece of land in question before he could pursue a nuisance claim.
3. Mr M's solicitors addressed the issue in their advice, which Allianz considered. That made clear there was still a dispute over the location of the boundary and/or Mr M's access over the piece of land over which he has not yet proved ownership and over which he had no existing rights.
4. It's inaccurate to say Allianz overlooked the sliver of land. And they disagree they missed any opportunity to look into things further. Their requests for information/clarification went via Mr M's representative. It was difficult to progress things since they didn't have direct access to the solicitors and found the representative's communications confusing and contradictory. When they had clarification from Mr M's solicitors in April 2022 that there was an encroachment onto Mr M's land, they offered to meet one third of the legal costs in pursuing a claim.
5. They had been aware of the encroachment previously. And the offer was made on the basis two thirds of the claim relates to adverse possession/easement claims over the disputed piece of land, which aren't covered under the policy. And one third relates to the breach of Mr M's legal rights relating to encroachment on his side of the boundary where there is technically a trespass, even though it isn't viable as a standalone claim. So, their offer was an exercise of discretion.
6. Allianz understand the basis of Mr M's claim has changed since he brought it to us. How is unclear. But if Mr M's claim falls within the policy terms and conditions, they will meet it.
7. In relation to my proposed redress, Allianz said:
  - a. There was no basis on which they should treat Mr M's claim as if cover had been accepted in January 2022 or pay the legal costs he'd incurred since then or compensation. To require them to would be unfair since, for the reasons they'd explained, he isn't entitled to cover.
  - b. It's unclear what Mr M is now seeking cover for, so they aren't able to deal with the claim in line with the policy terms.
  - c. Mr M's representative could have made the adverse possession claim. Allianz question why, when he's already incurred solicitors' fees, Mr M didn't have funds to make it. It was time critical, as he knew. Based on his solicitors' advice, Mr M

still had the chance of making the application in March 2022. He had a duty to take steps to protect his position. My proposed direction in relation to this is unreasonable.

### **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've considered Mr M's query and Allianz's detailed submissions in response to my provisional decision carefully. I'm grateful to Allianz for clarifying their position and explaining the basis of the offer they made to Mr M.

I'm not persuaded the nature of Mr M's proposed claim against his neighbour has changed substantively since he originally brought it to the Financial Ombudsman Service. I mentioned in my provisional decision there had been confusion about that. Whether or not Mr M thinks it's necessary, the lawyers have advised he needs to establish rights over the disputed area of land to pursue claims for trespass and nuisance over that land. His complaint relates to the withdrawal of cover to pursue such claims. That is the complaint I've considered, and the parties have had the opportunity of commenting on. I think the position is clear.

The Financial Ombudsman Service looks at every complaint on its individual merits to come to a decision that's fair and reasonable in the circumstances of the case. It isn't bound by precedent.

This complaint involves a claim for trespass and nuisance over land where ownership is in question. Mr M had provided documentation and information that satisfied the panel solicitors he had a reasonable chance of successfully claiming adverse possession over the disputed area of land. And if he was successful in that, he'd likely be able to establish trespass over that land.

I've considered Allianz's arguments as to why the issues should be considered as separate, and why claims for establishing property rights aren't covered under the policy. But in this case, I don't agree. The issue of where the boundary lies is not the only issue. The trespass and nuisance claims that are covered under the policy are bound up with the ownership and access issues. The panel solicitors recognised that in the advice they initially gave in November 2021. They reiterated it when they discussed things with Allianz in January 2022. And Mr M's solicitors' later advice broadly confirmed what the panel solicitors said.

Bearing everything in mind, I'm still of the view that it's fair and reasonable, in the individual circumstances of this case, to set aside a strict interpretation of the policy wording and for Allianz to meet the claim, subject to the other terms and conditions of the policy.

I acknowledge Allianz found communication with Mr M's representative challenging. I appreciate they made efforts to come to a resolution they felt was reasonable. However, having carefully considered all the points Allianz have made, I remain of the view, on balance, that it was unreasonable for Allianz to have withdrawn cover in early January 2022, as I've explained. That was before Allianz's more detailed communications with Mr M's representative. And in any event, it's fair and reasonable to compensate Mr M for distress and inconvenience he suffered when his cover was withdrawn, even though Allianz tried to find a solution afterwards.

The panel solicitors said an application for adverse possession "may" be required by early

February 2022, although the action they proposed was sending a letter of claim to the neighbours. Had Allianz accepted the claim in January, it's reasonable to think things are likely to have gone differently. Allianz could have controlled what happened and been able to act on the panel solicitors' recommendations. It's reasonable to think they would have authorised the adverse possession application if time was felt to be of the essence.

Although Mr M's solicitors mentioned in March 2022 that there were time limits for making an application for adverse possession, they didn't advise Mr M to make one then. I acknowledge they took further action by corresponding with the neighbours. That seems to have been based on their advice a negotiated resolution was the way forward. It was reasonable for Mr M to rely on that advice whilst continuing to pursue his LEI claim. Mr M's personal circumstances meant he was reliant on his representative to take action. His representative was meeting the costs on Mr M's behalf and has told us he didn't have sufficient funds to take further steps after that.

In all the circumstances, I don't think it's reasonable to expect Mr M to have pursued an adverse possession application. And it's fair to make the direction I proposed in my provisional decision, on the basis the earliest date Allianz ought reasonably to have authorised an application would have been around 14 days after they'd discussed the claim with the panel solicitors on 6 January, so 20 January 2022.

Bearing everything in mind, I see no reason to change the outcome I came to in my provisional decision.

### **Putting things right**

I remain of the view that Allianz should take the actions set out in my provisional decision to put things right.

### **My final decision**

For the reasons I've explained, I uphold Mr M's complaint and direct Allianz Insurance plc to:

1. Treat Mr M's claim as if cover had been accepted in January 2022.
2. Meet the legal costs Mr M has incurred since then in full.
3. Deal with Mr M's claim in line with the terms of the policy from now on. Allianz are entitled to appoint panel solicitors to represent Mr M until it becomes necessary for proceedings to be issued. If matters reach that stage, Mr M will be able to instruct his own solicitors subject to the terms and conditions of the policy, which will include Allianz agreeing terms of engagement with those solicitors direct and the hourly rates they will pay.
4. Pay Mr M £500 compensation for distress and inconvenience.
5. If Mr M is prevented from pursuing his claim for adverse possession at court entirely, then Allianz should instruct a barrister to consider what he would most likely have recovered if they had authorised the claim to be pursued on 20 January 2022 and pay Mr M for the value of that directly.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 7 April 2023.

Julia Wilkinson  
**Ombudsman**