

The complaint

Mrs S' complaint is about a claim she made on her Alwyn Insurance Company Limited ('Alwyn') landlord legal protection insurance policy.

All references to Alwyn in their decision include their claims handlers.

What happened

Mrs S made a claim on her landlord legal protection insurance policy for cover to pursue an interference with her right to use a road, when the owner of that road introduced a new parking scheme.

Around two weeks later Alwyn declined the claim on the basis that it didn't fall within the terms of the policy. Mrs S didn't agree and raised this with them. In response Alwyn asked her if she was residing at the property. She said she wasn't as it was tenanted. In response Alwyn told her the claim wasn't capable of cover because she couldn't claim in nuisance as it wasn't affecting her- it was affecting her tenant, and this wasn't what the policy provided cover for. Mrs S didn't agree with this so challenged the matter further. In response Alwyn said the claim fell under general policy exclusions so wasn't capable of cover. Unhappy, Mrs S referred the matter to the Financial Ombudsman Service to consider.

Overall Mrs S is unhappy with Alwyn's position on her claim, including the various reasons they've given to decline it and the time it's taken for the matter to be considered. Mrs S says she had to chase Alwyn numerous times when challenging the position and feels that Alwyn treated her unfairly. She wants Alwyn to reimburse what she's had to spend on legal fees and cover her claim.

Our investigator considered Mrs S' complaint and initially determined it shouldn't be upheld. She said the terms Alwyn were entitled to rely on the terms they'd referred to. Mrs S challenged this. In response the investigator reconsidered her position and upheld her complaint. She then said that Alwyn needed to take legal advice on whether they were entitled to decline Mrs S' claim under the policy terms both on the question of cover under the nuisance and trespass section of the policy and to determine whether the claim has reasonable prospects of success. Alwyn didn't agree. They said they were entitled to determine whether the policy was capable of cover themselves and didn't need to take legal advice on the issue. They remained of the view the claim wasn't one that was capable of cover. Because of this the matter was referred to me to decide.

I issued a provisional decision earlier this month in which I said:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I intend to uphold Mrs S' complaint against Alwyn for substantially different reasons to the investigator. I've explained why below.

The starting point is the policy terms. Under the Nuisance and Trespass section of the

policy, they say:

"What you are covered for

a) Nuisance

Adviser's costs and expenses to pursue your legal rights in a dispute with a third party (who is not your tenant) relating to a legal nuisance which interferes with the use, enjoyment or right over your insured property."

I agree with Alwyn that generally the interpretation of the policy is a matter for an insurer to determine and not usually one that requires them to take legal advice. There are exceptional cases in which policy cover is one that's a question of law. In those circumstances it's appropriate for insurers to seek advice, but I don't think that applies here in the most part. As Alwyn says, the interpretation of the policy term above isn't a matter of law. So, I won't be directing them to do so in this case.

Having considered the term that Alwyn have relied on, I disagree with their interpretation. Essentially Alwyn have said the term means that Mrs S needs to be living at her property in order to bring a claim in nuisance because she needs to be the person suffering the nuisance. In this case her property is tenanted so Alwyn say that the only person that can bring a claim in nuisance is her tenant. I'm by persuaded with this argument for several reasons. First, the policy is a landlord's legal protection insurance policy, so it's intended to provide cover for the benefit of the landlord. The policy contains a nuisance and trespass section. If this section can't be used unless the landlord resides at the property, there is little benefit to it containing this type of cover at all.

*Second, the construction of the policy wording doesn't require the landlord to be residing at the property. The term covers claims to pursue legal rights against a third party in relation to a nuisance "which interferes with **the** use, enjoyment or right over your insured property". Mrs S has demonstrated she has a right of way over the land in question, so she does have a right over the property that she is claiming has been interfered with. Whether she lives at the property or not makes no difference. And whilst Alwyn has said the term is intended to cover claims brought by Mrs S in her name only, the term isn't constructed to give effect to that. Rather it covers interference with "**the**" right over Mrs S' insured property.*

*The issue of whether the claim can be brought in Mrs S' name or the tenant's name is in my view a matter of legal interpretation and not one that Alwyn can determine. Alwyn aren't legal professionals. And whilst their claims handlers might have legal experience, they haven't provided anything in the form of a fully reasoned legal opinion from a suitably qualified legal professional setting out why they think Mrs S can't bring a claim in her own name. Mrs S has an express right of way. She's claiming that's been restricted by the imposition of parking permits on the land she has a right of way over. In the absence of a legal opinion setting out that Mrs S can't bring the claim herself, I'm not satisfied that Alwyn are able to successfully make this argument. But even if they're right and the claim can only be brought by Mrs S' tenant, there's nothing in the policy terms that means the claim isn't covered if the tenant is happy to pursue the claim in their own name. After all the policy covers an interference with "**the**" right over Mrs S' insured property. It doesn't reference that the claim needs to be made in her name, nor does it exclude this situation.*

Alwyn has said that the Insurance Product Information Document ('IPID') sets out that Mrs S needs to permanently live at the property in order for cover to engage. The IPID doesn't form part of the policy terms. So, Mrs S isn't bound by it. But even if I take into account what it says, I don't agree that it makes it a requirement for Mrs S to live at the property in order to bring a claim. That's because the document says:

“What is this type of insurance?”

Landlord Legal Protection is a legal expenses insurance contract which provides insured legal advice and representation in disputes relating to a residential property let:

- under an assured shorthold tenancy, a short assured tenancy or an assured tenancy as defined by the Housing Act 1988 (updated and amended by the Housing Act 1996);*
- under the Housing (Scotland) Act 1988 or private residential tenancies defined in the*
- Private Housing (Tenancies) (Scotland) Act 2016;*
- under the Private Tenancies (Northern Ireland) Order 2006;*
- to a limited company or business partnership for residential use by their employees;*
- where you permanently live at the property.”*

In my view the description explains a variety of circumstances in which cover will be provided but it doesn't limit it. It wouldn't in any event make sense to do so because the purpose of a landlord's legal protection policy would be to protect the landlord, who, in most cases wouldn't be permanently living at the property anyway.

Finally, Alwyn have said that the claim Mrs S has made might be a potential contract dispute, which is excluded. They've referred to the policy exclusion which says:

“There is no cover for:

7) Freehold, leasehold and rent reviews or assessments”.

There's nothing in the section they've quoted which limits contract disputes, so I'm not sure why Alwyn quoted this wording at all. But even if contract disputes aren't covered, the claim Mrs S is making is for an interference with her express right of way, which is clearly covered under the nuisance provision of the policy as I've set out in detail above.

In addition to the various reasons given to decline her claim, Mrs S is also unhappy with the time it took Alwyn to respond to her communications, which she says she had to chase on a number of occasions. I've looked at the timeline of the claim. It's clear to me that it took Alwyn a considerable period of time to come back to Mrs S after she challenged the initial position they took. And for the reasons I've set out above, I don't think their position was reasonable and didn't accord with the policy terms. This would've been both frustrating for Mrs S and caused her inconvenience. So, whilst I won't be awarding her anything in respect of the legal costs she's incurred (because those were something she chose to incur herself) I have set out what I think is fair compensation for the trouble and upset caused to her below.

Overall and for the reasons I've set out above I think Alwyn were wrong to decline Mrs S' claim for the various reasons they've relied on. I've set out what I think Alwyn should do to put this right below.

Putting things right

Alwyn should:

- Accept Mrs S' claim under the nuisance section of the policy and arrange for her claim to be assessed by suitably qualified legal professionals under the remain terms.*
- Pay Mrs S £150 for the trouble and upset caused to her.”*

I asked both parties to provide me with any more comments or evidence in response to my provisional findings. Both parties responded. Alwyn said that whilst they don't agree with my decision, they don't object to the content of it and have nothing further to add.

Mrs S has asked me to reconsider my decision not to award her the £120 in legal costs

she's claiming for seeking assistance elsewhere, after Alwyn declined her claim. Mrs S says that Alwyn's conduct meant that she had no choice but to incur expenses for legal advice to challenge the imminent setting up of the parking restriction scheme that threatened to interfere with her right of way. And she told Alwyn this was a claim that needed urgent attention. In the absence of receiving any assistance from them, Mrs S says that she joined others similarly affected by the parking restriction by engaging the services of a suitable legal professional. She wants Alwyn to reimburse her for those costs now.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, and in the absence of any submissions from either party on the substance of my provisional findings, I remain of the view that Mrs S' complaint should be upheld.

Turning now to Mrs S' submissions about her legal costs; I remain of the view that Alwyn aren't obliged to pay these. That's because I can't say whether this is a claim that Alwyn will conclusively cover to conclusion once the matter is reviewed by suitably qualified legal professionals. Policies like the one Mrs S took out are subject to various terms and conditions. And although I determined that Alwyn should not have declined her claim on the basis of the terms they cited, that doesn't mean her claim will, for example, have reasonable prospects of success or be proportionate to pursue. If not, then Alwyn will not be obliged to pay her claim. By awarding Mrs S her legal costs, I'd be presupposing that Alwyn was always going to cover them. But I don't know that and neither do the parties at the present time. That's a matter for determination by a legal professional that Alwyn will look to appoint now.

As I said in my provisional decision, it was Mrs S' decision to incur the legal costs she did. She might have felt she needed to because the matter she was faced with was time sensitive, but that's not something I can say Alwyn are responsible for because they haven't yet determined this is a claim they'll fund and even if they did, I can't reasonably say that such advice would have been obtained by the date Mrs S took legal advice, if everything had gone as it should have. So, for that reason I think Alwyn should put things right in the same way I set out within my provisional decision. I've recited that again below.

Putting things right

Alwyn should:

- Accept Mrs S' claim under the nuisance section of the policy and arrange for her claim to be assessed by suitably qualified legal professionals under the remain terms.
- Pay Mrs S £150 for the trouble and upset caused to her

My final decision

I uphold Mrs S' complaint against Alwyn Insurance Company Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 16 February 2024.

Lale Hussein-Venn
Ombudsman