

complaint

The circumstances and background to this complaint were set out in my provisional decision of November 2014 which was in the following terms:

complaint

Mr and Mrs S complain about the handling of their legal expenses claim by Ecclesiastical Insurance Office Plc. References to Ecclesiastical include its claims handlers.

background

Mr and Mrs S sought funding from Ecclesiastical for their dispute about a boundary wall built by their neighbours on what Mr and Mrs S believed was their land. They were concerned about the structural integrity of the wall and damage caused by the building work.

Ecclesiastical considered the claim under the property section of the policy which sets out the benefits as:

[The claims handler] will negotiate for the insured person's legal rights in a civil action relating to material property (including your principal home) which is owned by the insured person or for which the insured person is responsible following:

- (1) Any event which causes or could cause physical damage to such material property provided that the amount in dispute is more than £100; or*
- (2) Any nuisance or trespass, provided that you are responsible for the first £250 of every claim.*

Ecclesiastical appointed panel solicitors to assess the claim, cover being conditional upon the claim having reasonable prospects of success. The solicitors consulted Counsel and obtained expert evidence. In November 2010, the solicitors advised that a claim for the rebuilding/strengthening of the wall—and for the damage caused by its construction—had prospects of greater than 50%. In May 2011 the solicitors informed Mr and Mrs S that Ecclesiastical was withdrawing cover for the dispute about the integrity of the wall. They said this was on the basis that Mr and Mrs S's proposed action for the repair/strengthening of the wall and on-going covenant for its maintenance fell outside the policy cover; Ecclesiastical was willing to pay Mr and Mrs S the value of their claim—as assessed by their surveyor—for the damage caused by the neighbours' building work but it would not provide any further policy cover.

Mr and Mrs S instructed their own solicitors to deal with continuing correspondence from their neighbours. These solicitors challenged Ecclesiastical's decision to withdraw cover and Ecclesiastical instructed a different barrister, Mr A, to consider the policy position and the merits of the proposed claims. He concluded that there could well be cover for a claim for an injunction requiring strengthening of the wall but that further consideration of the imminence and likelihood of any collapse was required before a view could be given on prospects of success.

Ecclesiastical was not prepared to pay for further expert evidence but said it might consider reimbursement of the cost of such evidence should it confirm that the collapse of the wall was imminent.

Mr and Mrs S remained dissatisfied and referred their complaint to us, stating there had been no change in circumstances after the panel solicitors' report in November 2011 which

justified the removal of cover some months later. They said they had incurred substantial legal costs in seeking reinstatement of cover and in dealing with threats of legal action from their neighbour. They felt they had had no option but to instruct their own solicitors to represent them and that Ecclesiastical should reimburse these costs.

Our adjudicator obtained Ecclesiastical's agreement to make a slightly increased offer to take into account the value of the trespass claim as advised by Mr and Mrs S's own solicitors. While he noted that Mr and Mrs S's own solicitors took the view that a court would intervene without evidence that the collapse of the wall was imminent, he considered that Mr A's opinion carried more weight. He said he would ask Ecclesiastical to reinstate indemnity if Mr and Mrs S could provide a legal opinion—from a barrister of comparable experience to that of Mr A—which gave reasonable prospects of obtaining an award of the costs of rebuilding the wall.

Our adjudicator did not find that Ecclesiastical was liable for the legal costs incurred by Mr and Mrs S since indemnity had been withdrawn as he did not consider they fell within the policy cover. He also took the view that Mr and Mrs S's claim for a declaration regarding the true position of the boundary did not fall within the policy cover. He concluded that Ecclesiastical's bagatelle offer—based on Mr and Mrs S's surveyors' assessment of the cost of repairing the damage to their property and their solicitors' reported assessment of their trespass claim—was reasonable.

Mr and Mrs S did not accept the offers made by Ecclesiastical for their claims for trespass and damage to property and they have appealed against our adjudicator's assessment.

Their submissions include:

- ☐ *The panel solicitors had advised their claim had prospects and yet some months later—without any intervening advice—had stated that Ecclesiastical did not intend to pursue the case. This was many months before Ecclesiastical obtained Mr A's opinion and it had not therefore relied on his advice when it had withdrawn cover.*
- ☐ *Mr A had not considered the case as a whole to include the four main aspects – trespass, instability of the wall, damage to their property and the disputed boundary line. They questioned why Ecclesiastical had used a different barrister to the one who had advised previously in favourable terms. It seemed more intent on justifying its policy decision than dealing with the matter objectively.*
- ☐ *It was reasonable for Ecclesiastical to meet at least some of the costs incurred in communicating with their neighbours after the removal of cover, given the threatening letters received from them.*
- ☐ *The settlement offered for the damage to their property was insufficient to cover the actual repair costs. In any event, the repairs could not be carried out until the boundary had been defined.*
- ☐ *It would now be difficult to insure against liability for potential damage from the wall's collapse and there could be problems if the damage occurred outside the limitation period and if the neighbours sold their property. Ecclesiastical had refused to ensure that the neighbours took responsibility for the wall through an amendment to the deeds or similar action.*

Since our adjudicator considered the matter, Mr and Mrs S have received the judgment made further to their application under the Land Registration Act for a declaration as to the correct boundary line. I understand the tribunal found in their favour and ordered the neighbours to pay the costs of the application. Mr and Mrs S have also informed us of the

county court proceedings they have recently issued against their neighbours. These include a claim for the costs of removing/strengthening the wall as well as the damage caused by the building works.

my provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

As is invariably the case in legal expenses insurance policies, the cover is subject to the claim having reasonable prospects of success. The policy states that cover will only be provided ‘...if there is a reasonable chance of recovering damages, or of a successful defence in the event of a civil claim.’

We do not regard such policy terms as unreasonable.

It is also a term of the policy that Ecclesiastical may ‘...decide to pay the insured person the amount of damages that the insured person is claiming or which are being claimed against them instead of starting or continuing legal proceedings.’

It seems that Mr and Mrs S’s main grievance arises from Ecclesiastical’s withdrawal of cover for a claim which had been assessed as having prospects by its panel solicitors. This appears to have been due to Ecclesiastical taking the view that the proposed claim against the neighbours concerning the integrity of the wall did not fall within the policy cover.

I am not convinced that Ecclesiastical acted fairly in withdrawing cover in April 2011. It is not apparent that it had received any compelling legal advice to support its decision and it was only in February 2012 that it obtained Mr A’s advice. It seems his advice was that further expert evidence was needed about the imminence of any collapse before he could assess a claim concerning the integrity of the wall as having prospects. I understand, however, that he considered that proceedings could be issued in relation to Mr and Mrs S’s various claims on the basis they were linked.

Mrs S’s own solicitors have previously argued that Mr and Mrs S’s position could be prejudiced if they waited for the wall to collapse and that it would be better to bring all their claims—to include trespass, nuisance and loss of right of support—in one action. I gather that proceedings have now been issued to prevent the various claims becoming time barred.

In all the circumstances, I believe it reasonable for Ecclesiastical to now consider funding the protective proceedings recently issued by Mr and Mrs S subject to the terms and conditions of the policy. I gather Mr and Mrs S are currently acting as litigants in person but taking advice from Counsel on a public access basis.

I also consider Ecclesiastical should reimburse Mr and Mrs S their reasonable legal costs incurred when they instructed their own solicitors further to Ecclesiastical’s withdrawal of cover, subject to any recovery of costs in their successful application under the Land Registration Act. I believe it was reasonable for Mr and Mrs S to instruct their own solicitors to deal with the correspondence received from their neighbours in relation to the on-going dispute and to advise on the policy position.

my provisional decision

For the reasons set out above, Ecclesiastical Insurance Office Plc. should:

- (i) Consider funding the county court proceedings issued by Mr and Mrs S against their neighbours, subject to the policy conditions.*
- (ii) Reimburse Mr and Mrs S their reasonable costs incurred with their own solicitors further to the withdrawal of cover by Ecclesiastical, subject to any costs recovered in their application under the Land Registration Act.*

developments

Mr and Mrs S have made no further representations apart from stating their intention to serve proceedings on their neighbours and that an advice on prospects could be made available to Ecclesiastical should it wish.

Ecclesiastical wished to clarify there were three parts to the claim:

- Damage –It had previously agreed to make a bagatelle payment towards this and it did not appear this element was in issue.
- Trespass – When it withdrew indemnity in April 2011 it had been informed by Counsel that this head of claim was unlikely to succeed. Cover had therefore been correctly declined.
- Nuisance/potential damage – It appeared in April 2011 that further expert evidence was needed to confirm what action Mr and Mrs S could bring. There was an indication that removal of the wall would not be possible and Ecclesiastical believed this was not a nuisance claim. Counsel seemed to agree it was an action to prevent damage; he suggested there were no reasonable prospects of obtaining an injunction to remove the wall as the situation was not immediate enough but suggested the expert should be questioned again to confirm how likely it was—and when—the wall would fall. This was important; if the wall could stand for 20 years, Ecclesiastical did not think we would suggest it should have pursued a nuisance claim as there would not be nuisance until 20 years had passed.

While it believed its decision to withdraw cover was correct and based on Counsel's advice, it was willing to explore a claim in nuisance further as matters had moved on since the claim had first been presented. It was possible there were further experts' reports and it would be prepared to instruct Counsel to review the expert evidence received to date; should Counsel be satisfied that any potential damage was sufficiently imminent to require remedial action for replacement of the wall, it would provide cover for this aspect. If there was no recent report, it would be happy to pay for a further report to determine the nuisance/potential damage. It believed this was fair and reasonable.

It noted that Mr and Mrs S were successful in their application under the Land Registration Act but considered that any costs associated with the declaration on the boundary should be excluded from any award made for costs. A declaration on the boundary was not an action in trespass, nuisance or damage but a claim to establish legal rights—which was not an insured event under the policy.

my findings

I have carefully considered the further submissions made by Ecclesiastical.

I remain unconvinced that Ecclesiastical acted reasonably in withdrawing cover in April 2011 in the absence of any compelling legal advice to support its decision. Cover was withdrawn many months before it obtained a further opinion from Counsel.

Ecclesiastical refers to its understanding that the damage caused to Mr and Mrs S's property is no longer in issue. It seems, however, that Mr and Mrs S do not accept that the bagatelle payment offered previously was adequate compensation for the actual damage caused by their neighbours' building works. I understand they still wish to pursue this aspect of the claim and I gather it is included within the legal proceedings now issued against their neighbours.

I note that Ecclesiastical has now indicated willingness to instruct Counsel to review the expert evidence in relation to the wall. As stated in my provisional decision, I believe it would be reasonable for Ecclesiastical to consider funding the claim made in the county court proceedings recently issued by Mr and Mrs S, subject to the policy conditions.

my final decision

For the reasons set out above, Ecclesiastical Insurance Office Plc. should:

- (i) Consider funding the county court proceedings issued by Mr and Mrs S against their neighbours, subject to the policy conditions.
- (ii) Reimburse Mr and Mrs S their reasonable costs incurred with their own solicitors further to the withdrawal of cover by Ecclesiastical, subject to the policy conditions and any costs recovered in their application under the Land Registration Act. It should also pay interest at 8% simple per annum from the date Mr and Mrs S paid any of these costs to the date of settlement.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr and Mrs S to accept or reject my decision before 2 March 2015.

Christopher Tilson
ombudsman