

complaint

Mr M is unhappy that Ageas Insurance Limited has refused to cover a claim under his legal expenses insurance policy.

Ageas appointed claims handlers to deal with the claim on its behalf and all references to Ageas in this decision should be read as including those claims handlers.

background

I issued a provisional decision on this matter on 16 May 2017, part of which is copied below:

“Mr M made a claim to Ageas in 2015 to dispute a planning permission application made by his neighbour. I understand panel solicitors were appointed but the application was withdrawn and so no further action was taken.

Then in March 2016, Mr M contacted Ageas again to make a claim against his neighbour for unjust enrichment as a result of the Land Registry failing to correctly register a restrictive covenant. I understand it concerns the use of land that was meant to be designated as amenity space and not to be built on. The Land Registry had agreed it had made an error and would have rectified the register but the neighbour objected and so the matter would have to go before the Lands Tribunal.

The panel solicitors said that the policy doesn't cover help with complaints or reviews about government bodies and because the action to get the register rectified wouldn't amount to an infringement of Mr M's rights in relation to his property the rectification of the Land Register might not be covered. But they said that they would get advice on the prospects of a claim against the Land Registry and/or the neighbour from a barrister.

The solicitors obtained an opinion from a barrister. He thought there were reasonable prospects of getting the Land Register rectified but he didn't think this would help Mr M because he didn't think there were reasonable prospects of being able to enforce the covenant in any event and the policy cover is subject to the claim having good prospects of a successful outcome.

Mr M provided his own barrister's opinion. He didn't give a percentage chance of the covenant being enforceable at first but said that the covenant would be enforceable if the register were to be rectified, or at the very least that there would be 'a real prospect' of being able to successfully enforce it.

One of our adjudicators looked into the case at this stage. She didn't think that it should be upheld. The adjudicator said that the policy covers certain specific matters, including an infringement of the policyholder's legal rights as a result of their ownership of their property. She didn't think that the tribunal proceedings could be considered an infringement of Mr M's property rights. This is because, depending on the outcome, the covenant may or not be registered. She thought the neighbours would have to take some further action before there could be the possibility of his rights being infringed.

The adjudicator also thought that Ageas was entitled to rely on the first barrister's opinion that there aren't reasonable prospects of being able to enforce the covenant, even if the title was rectified. As Mr M's barrister hadn't said that there would be reasonable prospects of enforcing the covenant, she didn't think that Ageas was wrong to reject the claim.

Matters have moved on considerably since then.

A subsequent email from Mr M's barrister's clerk in January 2017 (in response to a request for him to express his view of Mr M's chances as a percentage) says the barrister's comments are "in my view, there would be a 60-70% chance of being able to enforce the covenant, should (a) there be a breach of it; and (b) the register be rectified".

Ageas asked its barrister to consider the opinion provided by Mr M but initially he didn't think it changed his advice on the matter. He thought the chance of registration was more than 51% but still had concerns about enforceability. However, after Mr M provided further arguments and information, the panel barrister issued another opinion in December 2016, which said that there would be a more than 50% chance of success in enforcing the covenant once it's rectified, if the s 106 agreement (that applies to the land) remains in place. But he couldn't advise on the prospects of the neighbours getting the s106 agreement discharged, as this would have to be referred to a planning expert. Mr M's barrister also provided another opinion in support of his case, commenting on the s106 agreement.

In response to this, Ageas asked the panel solicitors to reconsider the claim but they said it was a matter for Ageas to consider if it was covered under the policy. Ageas then confirmed its position that a claim against the Land Registry is not covered under the terms of the policy, on the basis the policy doesn't cover action against a government agency. Ageas did also say that it would reconsider the matter after the rectification of the title deeds.

Mr M doesn't accept this and didn't accept the adjudicator's assessment. I will summarise Mr M's submissions made in the initial claim, complaint and in response to the adjudicator's assessment, below:

- Although the Land Registry had made the mistake, it was prepared to rectify it and would have done so had his neighbour not objected. Therefore the fact the Land Registry is a government authority is not relevant, as the dispute is with the neighbour and is not a claim against a government agency.*
- His barrister always made clear there are good prospects for the successful registration and enforcement of the covenant.*
- In any case, neither barrister were asked to consider the prospects of an actual enforcement action and it seems therefore entirely inappropriate for us to make any assumption as regards the actual prospects of success for enforcement action given this.*
- The claim was taken on by Ageas as a claim to get the register rectified, not about enforceability and so the first barrister didn't have the information and evidence required for him to be able to make an assessment one way or another about enforceability.*
- His barrister's subsequent opinion took this evidence into account and he concluded that the covenant would be enforceable (once rectified) and gave a prospects figure of 60-70%. Ageas hasn't given any weight to this second opinion, which should carry more weight than the first barrister's, because he had all the relevant information.*
- The two claims (rectification of the register and enforcement) would be heard by two different judges and would be subject to two different judicial processes (one first tier tribunal and one in the County Court).*
- And there's no reason to think an enforcement case would be necessary yet.*
- If I award his legal costs, interest should also be added and this shouldn't be counted towards the limit of indemnity under the policy.*
- His legal rights have been infringed because the mistake by the Land Registry has meant he can't enforce the covenant. Where's the legal opinion that says his legal rights*

haven't been infringed? Not even the panel solicitor said that and he hasn't been told of this argument by the panel solicitors, who only referred to prospects of success.

- It's obvious what my decision must be. Both barristers have now agreed that there is a greater than 50% chance of success for the rectification case and enforcement.*
- Ageas' has taken the exclusion in relation to actions against government agencies out of context. The restriction it refers to applies only to specific claims (ie number four) listed on p 20-21 of the policy but his claim falls under number 2 of this section of the policy, for which there is no restriction*

Mr M has now also told us he has a hearing date in mid-June 2017 and has said that the time taken to resolve this matter has caused him significant financial hardship because costs he's had to pay his solicitor would have been paid by Ageas were if a decision had been issued by now.

As matters have moved on, and the complaint hasn't been resolved, it has been passed to me.

my provisional findings

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

This hasn't been an easy case to decide. Although Mr M is adamant that the outcome should have been clearly apparent, new information and evidence has been presented as the complaint has progressed. And therefore the details of the complaint have also changed.

Mr M's policy, like all legal expenses insurance policies, only covers claims that have reasonable prospects of success (ie more than 51% chance of succeeding). This isn't unreasonable.

The policy also covers specific legal issues. The sections relevant to Mr M's case are copied below:

"The policy covers costs and expenses...to pursue a civil action directly resulting from...

2. An infringement of you legal rights as a result of your ownership or occupation of your permanent place of residence...

4. Property Protection Civil actions relating to material property, which is owned by you or for which you are responsible, following:

- i. any event, which causes or could cause physical damage to such material property*
- ii. any nuisance or trespass provided that you are responsible for the first £250 of every claim."*

The policy also sets out the specific and general exclusions that would apply. One specific exclusion is the one that Ageas has sought to rely on in relation to any legal action against: "Any government or public, or local authority unless the claim is for accidental physical damage."

Mr M said that he hadn't been told that the panel solicitors didn't think any legal rights had been infringed but their letter to him of 29 March 2016 mentioned that there may not have

been an infringement of Mr M's property rights. However, that letter was a little ambiguous and the claim Mr M wants to proceed with is now the rectification of the land register, not the unjust enrichment, or a matter relating to a fence.

Most legal expenses policies, such as this one wouldn't cover a declaration of a legal right alone. But I can see an argument that the action Mr M has had to take amounts to an infringement of his rights. The issue has become a disputed land registry matter because his right to the covenant being registered is in dispute. And in any case, although this was raised initially and by the adjudicator, Ageas hasn't sought to rely on this ground more recently.

Ageas has recently confirmed that its position is that the claim is not covered because it relates to an action against a government agency. This is what it said in its final response letter and it's confirmed it is relying on that as the reason for refusing cover more recently.

I agree with Mr M that his case is not against the Land Registry and therefore the exclusion in relation to government agencies doesn't apply. The matter that's to be heard in June 2017, is apparently a disputed Lands Tribunal case. Mr M's opponent is the neighbour and not the Land Registry.

In addition, I agree in any event with Mr M that the exclusion, from the construction of the policy, applies only to trespass and nuisance claims and not to claims relating to the infringement of legal rights. The exclusions are listed next to the section of cover that they apply to and this exclusion is written next to part four. It appears Mr M isn't pursuing the trespass claim in relation to the fence built by his neighbours at this stage.

The policy requires there to be a [reasonable chance of a] successful outcome and both barristers think the chances of succeeding in getting the register rectified are good. Therefore I think that Ageas should agree to cover the action currently underway.

I also think it should backdate cover to the date that the panel barrister confirmed there was a reasonable chance of enforcing the covenant (ie his opinion of December 2016). Although he said this was subject to the s106 agreement, as matters stand the agreement is still in place. And instead of agreeing cover then, Ageas relied on the exclusion of actions against government agencies, which I've determined isn't relevant. Interest should be added to any costs to be reimbursed at our usual rate.

I don't think that Mr M's barrister's comments before then that there was a 'real prospect' of enforcing it was enough and it appears that the date of his email confirming the percentage chance was sent after the panel barrister's opinion in December 2016. However, if the dates aren't as set out here, Mr M can let me know in response to this provisional decision.

Ageas will be entitled to assess any costs incurred up to now for 'reasonableness' in the normal way. But because Mr M had no option but to instruct them and proceed with the matter, I don't think it can now seek to impose any different hourly charging rate on the costs incurred since December 2016 and now, and which I have determined it should reimburse to Mr M. And I think Ageas should agree to his representatives continuing to act for him.

So for clarity, it should agree to their appointment to continue the action and represent him in the forthcoming hearing.

Also for the sake of clarity, as Mr M pointed out, the declaration of the covenant in the courts and any possible future action in relation to breach of the covenant will be separate actions. Ageas will therefore be entitled to assess matters again if they proceed to those stages.

my provisional decision

I intend to uphold this complaint and order Ageas to:

- *Cover the claim for rectification of the Land Register going forward, including the cost of representation in the First-tier Lands Tribunal hearing, subject to the remaining terms of the policy;*
- *reimburse Mr M his reasonable legal costs in relation to this action (including his barrister's fees) since 28 December 2016; together with interest at 8% simple per annum from the date Mr M paid any of the costs to be reimbursed to the date of reimbursement."*

responses to my provisional decision

I invited both parties to respond to my provisional decision with any further information or arguments they wish to make before I issued my final decision.

Ageas has responded and confirmed it accepts my provisional decision.

Mr M has also responded. He's made some further points in response to my provisional decision, which are summarised below:

- He says that all his fees and costs – including his barrister's fees – should be paid with effect from 27 April 2016 (rather than December 2016) because I've found that Ageas should have funded his claim and its reasons for not doing so, weren't valid.
- The claim started as one for unjust enrichment but Ageas was, or should have been, aware that the circumstances of the claim had changed in April 2016 (ie to be a disputed land registry application, instead of a nuisance and trespass action); and was aware it wasn't against a government agency on 12 July 2016.
- Ageas' barrister noted on 27 April 2016, that the Land Registry was wrong to refuse to rectify the register and he thought there were reasonable prospects of successfully applying to have it rectified.
- It has already been accepted by the insurer and me that the rectification and enforcement aspects of this matter are entirely separate claims and the prospects of success for the enforcement of the covenant should not be considered until after the rectification claim has been completed.
- Ageas was also made aware by his barrister that there were reasonable prospects of successful enforcement of the covenant on 28 July 2016. Just because this wasn't in numerical terms is irrelevant.
- But although Ageas' barrister changed his opinion of the prospects for successful enforcement of the covenant in December 2016, this in fact is not relevant to the

costs that have been incurred since 27 April 2016 to date, as these costs relate only to the claim for rectification.

- And, the delay in reconsidering the evidence was entirely out of his hands. He spent considerable effort between April and December 2016, trying to persuade the panel solicitors that the barrister needed to review his advice.
- The Land Registry process has a strict timetable and so he had no choice but to instruct solicitors from 15 August 2016 to help him. Therefore fees and costs have been incurred between August 2016 and December 2016, in addition to his barrister's original opinion.

my findings

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

The declaration of legal rights, such as Mr M's in this case, wouldn't ordinarily be covered in isolation under a policy like this one, because it only covers actions relating to an infringement of the claimant's legal rights. Mr M's claim did change and because it became a disputed land registry application, I said in my provisional decision that I could see that this might amount to an infringement of his legal rights as a property owner. I therefore thought it was covered in principle – subject to the remaining terms of the policy, including that it have prospects of success.

This was apparently in July 2016, and so I think Ageas was acting fairly in not meeting any costs before this date. I did also consider whether it should meet any of the other costs incurred by Mr M before its barrister confirmed there were reasonable prospects of enforcing the covenant, and provisionally decided it wasn't obliged to.

I acknowledged in my provisional decision that any enforcement action would be brought in a different forum, and that prospects of any enforcement action can be reassessed at that stage (if enforcement action is necessary). After all, matters such as the existence of the s106 agreement may change.

However, this doesn't mean that I think the chances of actually enforcing the covenant weren't relevant to the assessment of the claim for rectification of the land registry. I consider it was relevant to the assessment of prospects whether the covenant (if registered) could be enforced. Otherwise if there were no realistic route for enforcement, the rectification would not be a reasonable legal action to take.

I have to consider Ageas' actions or omissions, as an insurer. It is entitled to rely on expert legal opinion and it did ask an experienced and suitably qualified barrister to advise on this case. It was entitled to rely on his advice. I explained in my provisional decision why I didn't think that Mr M's barrister's comments made before December 2016, were enough to have made Ageas disregard its own barrister's opinion about the possibility of enforcement action. It asked him to reconsider.

I understand Mr M's point that he had no choice but to start instructing his solicitors, and therefore incurring costs, before this happened and the time taken to get Ageas' barrister to reconsider isn't down to him. But Ageas didn't unreasonably delay and was entitled to make those enquiries. It is only obliged to meet costs once the claim has been established as

being valid under the policy. Therefore I remain of the opinion that Ageas was only in a position to do this on receipt of its barrister's advice in December 2016.

my final decision

I uphold this complaint and order Ageas Insurance Limited to:

- cover the claim for rectification of the Land Register going forward, including the cost of representation in the First-tier Lands Tribunal hearing, subject to the remaining terms of the policy;
- reimburse Mr M his reasonable legal costs in relation to this action (including his barrister's fees) since 28 December 2016; together with interest at 8% simple per annum from the date Mr M paid any of the costs to be reimbursed to the date of reimbursement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 24 July 2017.

Harriet McCarthy
ombudsman