

The complaint

Mr B complains that U K Insurance Limited (“UKI”) rejected a claim on his legal expenses insurance after having told him the claim would be covered.

What happened

Mr B made a claim on his policy to cover a legal action against a local authority. He said contractors had carried out roadworks outside his house, the road wasn’t reinstated properly and later on vibrations from traffic driving along the road started to cause damage to his property.

The policy provides cover for a claim like this against the local authority but only where the claim is for accidental physical damage. UKI initially accepted the claim and passed it to panel solicitors to deal with but later told Mr B his claim wasn’t in fact covered.

UKI said the claim didn’t relate to accidental damage but to something that happened over time. Mr B complained but UKI didn’t change its decision. In its final response to Mr B, UKI said:

- There had been debate about the meaning of the term accidental damage but the meaning was clear.
- If the damage was caused by the works carried out by the contractors the claim wouldn’t be covered as they were done before the policy started.
- If the damage was due to a lack of maintenance on the road then it wouldn’t be covered as the policy didn’t provide cover where the issue was caused by wear and tear or a lack of maintenance.

Mr B referred his complaint to this service but our investigator didn’t think it should be upheld. She said:

- The claim against the local authority must be for ‘accidental physical damage’ for it to be covered.
- The policy defines accidental damage as damage that’s sudden, unintentional and unexpected and this damage didn’t happen suddenly; it was the result of an ongoing problem.
- So it didn’t meet the definition set out in the policy and it was fair to decline the claim.

Mr B disagreed and requested an ombudsman’s decision.

I issued a provisional decision saying I intended to uphold the complaint. I set out my reasons as follows:

The relevant industry rules and guidance say insurers must deal with claims promptly and fairly; provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress; and not unreasonably reject a claim.

The policy includes cover for nuisance, trespass and damage to property but says

“We will only pay for claims relating to works carried out by a government, public or local

authority or their contractors if they are for accidental physical damage."

The legal claim Mr B wishes to pursue is against the local authority so it's only covered if it is for accidental physical damage.

The crux of the matter is what "accidental physical damage" means – the claim turns on that.

The policy includes definitions for some words and phrases, which are in bold type wherever they are used. This includes "accidental damage" which is defined as "sudden and unintentional physical damage that happens unexpectedly." However, the phrase "accidental physical damage" is not defined by the policy. Where something isn't defined, the usual approach is to give the words their ordinary, everyday meaning.

While some insurance policies define accidental damage to mean something that happens suddenly, many don't require it to be sudden. For "accidental" our approach has long been that it means something unforeseen and unintentional. So in the absence of anything else, I would generally say the issue is simply whether the damage was caused by something unforeseen and unintentional. It doesn't need to be sudden unless the policy specifically defines it in that way.

Mr B has provided some legal advice that's in line with this with. That advice says

- There is physical damage, which must be accidental – the drivers did not intend to cause it (and were probably not aware they had).
- There's no logic for saying damage has to be "sudden" – accidental physical damage is not defined in the same way as accidental damage and so must be given its ordinary meaning, which isn't limited to sudden damage.
- If the word "sudden" is not used it can't be implied into the policy.

I find this more persuasive than the arguments UKI has put forward.

The policy does define accidental damage as "sudden and unintentional physical damage that happens unexpectedly". So if that phrase, in bold type, were included in this particular term, that is the definition to be used. But that phrase isn't used here.

What UKI is effectively saying is that the same definition should apply for accidental physical damage – if accidental damage is something sudden, then accidental physical damage must be the same. However, if something's not defined in the policy, we can't simply imply something into the definition. And as I've explained, we have long taken the view that accidental damage doesn't have to be sudden. UKI says it considers accidental physical damage to be a one off event. But that isn't what the policy says. If it wanted to define it in that way, or to say it must be sudden, it could have said so (in the same way it has chosen to define accidental damage) but it hasn't done so.

UKI says "accidental physical damage" wouldn't have a different meaning to "accidental damage" unless the policy clearly stated this. But if UKI wanted them to have the same meaning it could have made this clear; all it had to do was define them both. I can't assume them to have the same meaning. As UKI chose not to define the phrase "accidental physical damage" I have to give those words their ordinary meaning.

UKI also says the claim isn't covered either because the work was done before the policy started or because the issue is a gradual wear and tear problem. I don't think either of these applies.

As with most legal expenses insurance, there's no cover for incidents that happened before the policy is taken out. The aim is to cover future, unforeseen risks.

The original work on the road was done before Mr B bought the policy. But the vibrations – and therefore the damage – only became apparent later. At the point when the policy started he wasn't aware there was something that would lead to a legal dispute. So it wouldn't be fair to treat this as a pre-existing dispute.

The expert evidence Mr B obtained about the problem says the damage is not due to wear and tear; it's caused by the vibration events following the poor reinstatement of the road. Taking everything into account, including the expert reports and the legal opinion Mr B has provided, I don't think it's fair for UKI to treat this as wear and tear or poor maintenance rather than accidental damage.

UKI may say it didn't intend the policy to cover this type of claim but I have to consider what the policy actually says rather than what UKI intended. In the circumstances of this case I don't think it's fair to decline the claim for the reasons UKI has relied on.

That's not to say the claim will definitely be covered. There may be other issues – for example whether the claim has reasonable prospects of success – that still need to be considered. But it isn't fair to reject the claim on the basis that this is not accidental damage or that the damage happened before the policy started.

For these reasons, my provisional decision was that I was minded to direct that UK Insurance Limited

- is not to reject the claim on the basis this is not accidental damage or that the incident happened before the policy started; and
- should accept the claim, subject to the remaining policy terms and conditions.

Replies to the provisional decision

UKI has replied, saying it is in agreement with the provisional decision and has nothing further to add.

Mr B says he welcomes the provisional decision but has asked me to consider some additional points:

- UKI's panel solicitors assessed the claim in September 2021 and said a claim for an injunction had reasonable prospects of success, so that has already been dealt with.
- The solicitors were proposing to draft a letter before action but this was delayed and then cover was withdrawn.
- As the case was at issue of legal proceedings/"Letter before Action", he had the right to choose his own solicitors. So the claim should not only be reinstated, he should be free to choose his own solicitors.
- There have already been lengthy delays and he's concerned that any further delays assessing the claim might affect his ability to issue proceedings in time.

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.

Both Mr B and UKI say they accept the provisional decision and neither party has provided any reason for me to change my conclusion. But Mr B has asked me to go further and direct that UKI should allow him to choose his own solicitors to pursue the case for him. He says the claim has already been assessed as having a reasonable chance of success and he's at the point of issuing proceedings.

I've considered his comments carefully but don't see any reason to go beyond the directions set out in the provisional decision.

I appreciate the panel solicitors assessed the prospects of success. Assuming nothing has changed then Mr B may expect UKI to be able to provide cover – as it intended to, before deciding the claim should not be covered. But if anything has changed since 2021 that might affect the prospects of success, it would be reasonable for UKI to review that. The solicitors will be able to confirm if the claim continues to have reasonable prospects.

A policyholder is entitled to choose their own solicitors once they are at the point of issuing proceedings. Mr B hasn't got to that stage yet. He points out that the panel firm proposed to issue a letter before action. That's a preliminary step and not part of the formal proceedings. Sometimes disputes are resolved at this point; offers might be made or there might be discussions on how to settle the case. If negotiations fail and the solicitors decide it will be necessary to issue formal action to take the case to court, that is the point where Mr B would be entitled to appoint his own choice of solicitor.

My final decision

I uphold the complaint and direct that U K Insurance Limited

- is not to reject the claim on the basis this is not accidental damage or that the incident happened before the policy started; and
- should accept the claim, subject to the remaining policy terms and conditions.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 6 February 2024.

Peter Whiteley
Ombudsman