

The complaint

Mr W's complaint is about a claim he made on his First Title Insurance Plc title insurance policy for known risks, which was declined.

Mr W doesn't think this is fair and has asked us to consider whether First Title were right to do so.

What happened

Mr W's land has a condition placed on it which prohibits other buildings being built on it without consent from another company.

Mr W planned to build on his land, but his neighbour objected to this and threatened to bring Court proceedings preventing him from doing so.

The First Title policy is intended to protect Mr W from specified adverse risks in relation to attempts to enforce the condition which relates to his land. When his neighbour threatened to take action against him, Mr W claimed on the policy to help him with this.

First Title declined the claim. They said there wasn't a claim under the policy they could consider because Mr W's neighbour had not taken any steps to enforce the condition affecting his land by issuing court proceedings. They said they would however be prepared to assist him if his neighbour issued proceedings against him in future.

Mr W wasn't happy with this position. He thought it exposed him to unnecessary risk and cost, particularly if he went ahead with his development and his neighbour issued proceedings against him at that point or even later. He felt that cover wasn't guaranteed by First Title and that he could find himself in a worse position for proceeding with the work. He asked First Title instead to help him remove the condition from his land. First Title declined.

Our investigator considered Mr W's complaint and concluded that it shouldn't be upheld. He agreed with First Title that there wasn't anything for them to indemnify because Mr W hadn't yet suffered a loss in relation to a known risk because proceedings hadn't yet been issued against him. He also said it was at First Title's discretion to fund a claim before this happened and that they were entitled to decline such a request as they had in this case.

Mr W doesn't agree, so the matter has been passed to me to determine.

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, I won't be upholding Mr W's complaint for broadly the same reasons set out by the investigator. I've explained why below.

In this complaint Mr W has asked us to determine whether he has a valid claim under the policy. But I don't think that's the correct question. The complaint, as brought to us, concerns

First Title's decision not to cover a claim on his behalf at present. It follows that the complaint I'm looking at is whether it was fair for them to decline cover in the way that they have.

There has also been significant discourse between the parties about what might and might not be covered by First Title in future scenarios. First Title has given some assurances about that. But as these aren't issues that were brought to this Service to consider, I won't be commenting on them further or deciding whether they are fair. If the subject matter of that discourse is later in dispute, that will then form the basis of a new complaint and not one I can consider here.

The starting point here is the policy terms. They cover a *"Known Risk"* which is defined as:

"A claim by a third party enforcing the breach of title conditions contained in a Disposition by (a particular company to a particular individual on a particular date) which states that "our said disponees and their foresaids shall be prohibited from erecting any other buildings in the subjects hereby disposed without our written consent which consent shall not be unreasonably withheld" because the Land is being developed for the purposes of the Insured Use".

The *"Insured Use"* that is defined in the policy relates to a specific planning application for the development of a further single residential dwelling house on Mr W's land.

Mr W argues that his First Title policy should have engaged because the policy defines the word *"Claim"* as *"any act by a third party in relation to the Known Risk"* and his neighbour's threat to issue proceedings falls into this category. He makes the specific point that the policy definition of *"Claim"* doesn't require court proceedings to be issued against him before cover engages.

It's correct that the policy definition of *"Claim"* is as described above but that definition isn't necessarily applicable to the context in which it is used in the definition of *"Known Risk"*. I say so because reference to claim isn't capitalised as it is elsewhere in the policy, and I don't in any event think these references in isolation inform whether First Title need to fund the claim that Mr W has made as it stands.

In order to determine that point, I have looked at the policy as a whole. In doing so I've noted that it covers *"Actual Loss"* which is defined more specifically at clause 1.1 as follow:

"1.1 'Actual Loss' means any and all of:

1.1.1 the difference between the Fair Value of the Land immediately before the date of an Order or Settlement and the Market Value of the Land immediately after the date of an Order or Settlement;

1.1.2 all sums that the Insured is legally liable to pay pursuant to or as a result of an Order;

1.1.3 all sums that the Insured is legally liable to pay pursuant to a Settlement;

1.1.4 sums expended by the Insured, or that the Insured has contracted to expend, on alteration, construction or demolition works on the Land in accordance with the Insured Use (including architects, lawyers and surveyors fees directly relating to such works), to the extent that these are made abortive by the Order or Settlement; and

1.1.5 interest payable by the Insured under the terms of a standard security over the Land or part of it, over any period of time in which the Insured is unable to pursue its intended development works in compliance with the Insured Use either (a) as a result of an Order for

an interim interdict in respect of the Known Risk suspending the carrying out of such works or (b) pursuant to a request from First Title to suspend the carrying out of such works pending the resolution of a Claim.”

In this case there is no “*Actual Loss*” at present because the threat from Mr W’s neighbour doesn’t amount to this. And whilst it’s true that the policy allows First Title to take a number of actions like reducing or eradicating the “*Known Risk*”, defending, minimising, mitigating or defeating the “*Claim*” and/or paying to settle it, this is entirely at their discretion- and they are not obliged to do so. That’s because the policy says “*In the event that the Insured notifies First Title of a Claim or a circumstance that may give rise to a Claim, First Title **may** (my emphasis) take any action (including starting legal proceedings in its own or the Insured’s name)...*” So overall, I’m not persuaded that First Title were wrong to decline Mr W’s claim as it stands.

I am sympathetic to Mr W’s concerns that First Title may not cover him for any specific losses should he proceed with his development and find himself on the other end of proceedings from the neighbour either during or after his work is completed. But that doesn’t mean that First Title were wrong to take the action they did here in declining his claim. It is of course quite possible that Mr W would be exposing himself to considerable risk by going ahead with the work. I can see that there are a number of variables that might add to this risk- such as the type of claim the neighbour might make or potentially arguments that the work itself isn’t in line with the “*Insured Use*”. I can’t comment on what might happen and whether First Title would be correct to decline or cover a claim in future hypothetical scenarios. I can only decide the complaint based on the current facts of the claim being declined. In these circumstances, I take the view that First Title didn’t do anything wrong and were entitled to turn the claim down in the way that they have.

My final decision

For the reasons set out above, I don’t uphold Mr W’s complaint against First Title Insurance Plc.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr W to accept or reject my decision before 1 August 2023.

Lale Hussein-Venn
Ombudsman