

The complaint

Mr L complains that Society of Lloyd's rejected a claim on the property damage section of his commercial insurance policy.

What happened

Mr L sought to make a claim on his insurance relating to a property owned by him. He said the property had been badly affected by a loss of light following the development of neighbouring buildings. He wanted to claim for the legal costs of a claim against the authority responsible for the housing development and/or the damages sustained as a consequence of the loss of light.

Society of Lloyd's said the claim was not covered because:

- Cover is for physical loss or damage caused by accidental means.
- Although loss of light has been defined as being a nuisance and light could be considered a physical object, there's no evidence loss of light has caused any physical damage to the property.
- There is no physical damage for the insurers to repair (or meet the costs of repair).
- That means the additional cover for professional fees doesn't arise so there is no cover for legal expenses.

When Mr L referred his complaint to this service our investigator didn't think it should be upheld. She said:

- Mr L needs to show an insured event has taken place, and specifically that there is physical damage to the property.
- He hadn't provided evidence of physical damage to the property as a result of the loss of light, so the policy can't come into force as there's nothing to be repaired.
- In relation to professional fees, there needs to be a direct link between the damage to the property and the fees. As there wasn't evidence of damage to the property, there would be no cover for professional fees either.

Mr L disagreed and requested an ombudsman's decision. He provided detailed comments in support. I won't set them out in full but they included:

- Light is 'physical' and therefore tangible; so it is a loss, whether or not there is damage.
- The policy defines damage and damaged property as physical loss to the property.
- The policy defines "event" to include "any nuisance" and loss of light is a nuisance.
- It's wrong for the insurer to say the definitions of "Event" and "Nuisance" in section B were not operative terms and so don't apply.
- It is established law that where a property is affected by loss of light, reinstatement is made by the payment of compensation.
- The damage which has arisen as a result of the deprivation of his light, plus the 'Trespass' and 'Nuisance' it clearly represents, brings into play the policy cover in question and so he is entitled to be compensated to the degree covered by the policy.
- The damage meets the accepted legal definition of "accidental damage".

- Where a nuisance has occurred, that is an event which is covered by the policy, and so related legal costs are also covered, together with professional fees related to the reinstatement of the property.

I issued a provisional decision saying I didn't intend to uphold the complaint. I set out my reasons as follows:

In making my decision I need to consider what's fair and reasonable in all the circumstances of the case, taking into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and (where appropriate) what I consider to have been good industry practice at the time.

Mr L's policy provides cover for a range of things including employers', public and products liability, none of which is relevant here. The relevant section of cover for this claim is Section B - Commercial Property Insurance. And the relevant part of this is Section 1 – Property Damage All Risks. This provides cover as follows:

The Insurers will indemnify the Insured against Damage arising from any accidental cause not being an Excepted Cause, occurring during the Period of Insurance, subject always to the Excess(es) and the limits, terms, conditions and exclusions of this Section and the Policy.

Replacement or Reinstatement

In the event of Damage under Item A (Building(s)) and/or Item B (Contents) insured hereby, the basis upon which the amount payable by the Insurers is to be calculated shall be the reinstatement of the Property Insured suffering Damage, subject to the following Special Provisions and subject also to the limits, terms, conditions and exclusions of the Policy except insofar as the same may be varied hereby.

For the purpose of this Clause "reinstatement" shall mean the carrying out of the after-mentioned work, namely:

a where Property Insured is lost or destroyed, the rebuilding of the property, if a Building, or, in the case of other property, its replacement by similar property, in either case in a condition equal to but not better or more extensive than its condition when new;

b where Property Insured is damaged, the repair of the Damage and the restoration of the damaged portion of the property to a condition substantially the same as but not better or more extensive than its condition when new.

The policy includes definitions for a number of terms including the following:

Damage

means accidental physical loss of, destruction of or damage to the Property Insured.

Damage to Property

means physical loss of, destruction of or damage to material property.

In the first instance, it's for Mr L to prove he has a valid claim.

Mr L has provided lengthy submissions with reference to various legal arguments and judgments. I have considered all of these carefully but won't set them out in detail. The statutory basis of our service is to deal with complaints quickly and with minimal formality. I've taken into account any relevant law but ultimately my role is to use my judgement to

decide what is fair, based on the main crux of a case. So, I will focus on what is relevant to the outcome I've reached.

Mr L says his property has been damaged and explained why he thinks the loss of light amounts to physical damage. He cites the judgments from various cases (including for example *Fay v Prentice*; *Colls v Home and Colonial Stores*; and *Jan de Nul [UK] Ltd v AXA Royale Beige SA*) as authority for saying interference with the right to light amounts to physical damage.

These cases refer to different situations. *Fay v Prentice* for example, concerns part of a building projecting over a garden, which was a trespass. Mr L refers to an inference by the courts that injury has occurred as a result of the trespass – or in other cases (for example *Colls v Home and Colonial Stores*) as a result of nuisance. He says it follows that the nuisance in the loss of light constitutes damage to property. And he refers to the judgment in the *Jan de Nul* case that damage occurs where the property is physically significantly affected. The decision in that case might suggest contamination of land is enough for a finding of damage, but that policy had a broad definition of damage which included 'loss'. In that case the property was physically altered with large amounts of silt deposited on it. And this part of the judgment was in relation to the issue of nuisance.

I agree the courts have said that where someone has a right to light and another person interferes with that right, this may be actionable with a claim for compensation. What I'm concerned with here is the contract of insurance, with terms and conditions agreed between Mr L and the insurer. Whether Mr L has a valid claim under the specific terms and conditions of this policy isn't necessarily the same as whether he has an actionable case against the other party to the dispute; different considerations apply.

Mr L has referred to various definitions of damage, but I need to bear in mind the general approach to interpreting policy terms, where the following principles generally apply:

- the words of the policy must be given their ordinary meaning and reflect the intention of the parties and the commercial sense of the agreement;
- a literal construction that leads to an absurd result or one obviously contrary to the parties' intention should be rejected, if an alternative more reasonable construction can be adopted;
- where there's ambiguity, the construction which is more favourable to the insured should be adopted.

I've considered the way damage is generally looked at in insurance. The precise meaning of 'damage' can vary, and will be influenced by the context in which the word appears. There's no universal definition which applies in all circumstances; it's necessary to construe the word in the context of the policy. But damage generally means some change in the physical state of the building. And in this case the policy term refers to physical damage which needs to be put right by carrying out repair work. So I need to consider the meaning of 'damage' in that context.

In my view, the policy wording is clear. It defines damage as physical loss, destruction or damage to the property. Giving that its ordinary meaning, the building needs to be physically damaged or destroyed. That means some physical change to the structure. I don't consider a loss of light meets that definition.

But more than that, where the property is damaged the policy terms say the way the policy will respond to this is to cover the cost of the work needed to repair the damage.

I don't see there's any ambiguity in this. Applying the ordinary meaning of the wording in the relevant terms, the intention set out in the policy is that if the building is physically damaged,

the insurance will cover the cost of repair work to fix that damage. So Mr L's claim will only be covered if he can show both that

- his property has been physically damaged and*
- repair work is needed to put it right and restore the property to a condition substantially the same as it was in before.*

That isn't the case here. There has not been a physical alteration to the building which needs repair work. He may have a right that he can pursue through the courts but that doesn't mean this policy will provide cover for his legal costs in pursuing that action.

Mr L doesn't agree with Society of Lloyd's that the definitions of "Event" and "Nuisance" in Section B were not operative terms and so don't apply. But whatever definition is given to those terms, the key point is whether the claim is covered under the terms I have set out above. Those terms don't refer to nuisance and limit cover to the circumstances described.

It may be established law that where a property is affected by loss of light, reinstatement is made by the payment of compensation but the issue I'm deciding is not what the relevant remedy would be if Mr L took his case to court. I'm only considering whether his claim is covered under the policy terms, not what might happen in any legal action he wishes to take.

Mr L also says the policy provides cover for professional fees and so he's entitled to cover for his legal expenses. The definition of "Professional Fees" in Section B of the policy refers to "architects", surveyors', consulting engineers' and legal fees necessarily and reasonably incurred with the Insurer's consent in the reinstatement of the Property Insured directly consequent upon its Damage by an event insured hereby...."

So again, this cover only arises where the property has been physically damaged, work is needed to repair the damage, and the legal fees relate directly to that work. It wouldn't extend to legal fees for taking legal action against the authority responsible for the loss of light.

I appreciate this case means a great deal to Mr L, given the impact on his property. But for the reasons I've explained the decision by Society of Lloyd's is both in line with the policy terms and is fair.

Replies to the provisional decision

Society of Lloyd's hasn't provided further comments in reply to the provisional decision but Mr L has. They are detailed and I won't set them out in full, particularly where they repeat any points made previously, but some key points include:

- I have misdirected myself by not considering the provisions of the General Insuring Clause of Section B of the policy and similar provisions in the Introduction, instead focusing on the Property Damage All Risks section*
- The General Insurance Clause and the Introduction both say the insurers agree to reimburse any loss, destruction or damage, accident or injury occurring.*
- So he's insured against any loss or damage he suffers, not simply damage to property. The loss of light is covered by the definition in the General Insuring Clause.*
- 'Damage' is defined as comprising three things - physical loss, destruction of, and damage to, the property insured. So it must follow that the loss of light suffered is a physical loss to the property.*
- The policy does not say damage must be considered in the context of physical damage that needs to be put right by repairs.*
- The Ombudsman is bound by the many cases which prove that damage does not require a result which causes the dismantling of the building (or parts of it).*

- A loss of light such as in this case is comparable with all those previously highlighted cases and examples, and on such a loss of light ‘damage’ arises – a property can sustain physical loss or damage without any structural alterations.
- The ‘Replacement or Reinstatement’ definition only applies when damage, which represents a dismantling of the structure of the building, has arisen – it does not apply when a ‘loss’ has arisen, as in the case of the loss of light to his building.
- The loss of light is also a nuisance, which is covered by the General Insuring Clause and the Introduction clause.
- When using his judgement to decide what is “fair”, the Ombudsman must be guided by what the legal authorities say.
- The law is clear that a breach of an easement (such as a right to light) results in ‘damage’ and when this happens the law stipulates that the damage must be recognised; damage is in law automatically deemed to have arisen and the Ombudsman is bound to accept this.

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.

Mr L refers to the General Insuring Clause at the beginning of Section B of the Policy. As he rightly points out, this says the insurer will provide cover for “*loss, destruction or damage, accident or Injury occurring during the Period of Insurance...*”

But that clause also says the cover is provided “*to the extent hereafter described...*” and is “*subject to the limits, terms, conditions and exclusions contained herein or endorsed hereon.*”

So while Mr L may be covered for any loss, destruction or damage, the cover is subject to the terms and conditions set out in the policy and must be considered in that context.

Mr L says I am bound by the many cases he has referred to and must be guided by what the legal authorities say. I do need to take account of any relevant law, but I’m not bound by it in the same way as the courts. It’s one of the considerations for me to take into account. And I need to look at any relevant conditions or exclusions and consider whether Society of Lloyd’s has applied those fairly in the circumstances of Mr L’s case.

Mr L has explained in great detail what the law says about damage. As I explained in my provisional decision, the policy terms say that where there has been damage, what the policy covers is “*reinstatement*” and that is defined in the policy as meaning carrying out works for “*the repair of the Damage and the restoration of the damaged portion of the property.*” I don’t see any ambiguity in this.

It’s for an insurer to decide what risks to cover. This policy says clearly that Society of Lloyd’s will provide cover where the damage is physical and where the way to deal with it is to carry out repairs to the property. That simply isn’t the situation here. There is no repair work that Society of Lloyd’s can pay for.

In these circumstances it remains my judgment that the decision by Society of Lloyd’s is in line with the policy terms and is fair.

My final decision

My final decision is that I don’t uphold the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 6 November 2023.

Peter Whiteley
Ombudsman