

## **The complaint**

Mr H complains that Amtrust Europe Limited has not provided cover for a claim on his legal expenses insurance policy.

Where I refer to Amtrust, this includes its agents and claims handlers acting on its behalf.

## **What happened**

In September 2020 Mr H made a claim on his policy for legal costs relating to a dispute with his neighbour.

Amtrust referred the claim to one of its panel solicitors, who provided their advice in November 2020. The advice was that the claim did not have reasonable prospects of success, which was required for cover to be provided.

Mr H's daughter has a power of attorney to deal with his affairs and has been helping him with his claim throughout. She complained on his behalf in March 2021, saying Mr H had proved that his claim had prospects of success through a surveyor's report; and there was a significant amount of land in dispute, so the value in dispute was proportionate to the costs of pursuing the case.

Amtrust asked for details of any legal advice Mr H had obtained together with the surveyor's report. Mr H had consulted his own solicitors and they sent an email in April 2021 saying, on the basis of the surveyor's report, a claim for trespass and a boundary declaration had good prospects of success. On receipt of this, Amtrust arranged for counsel to advise on the case.

Counsel's advice was that:

- There were reasonable prospects of getting a determination that the position of the boundary follows the line suggested in the surveyor's report, but it wasn't clear this meant Mr H could force the neighbour to remove a hedge that he said was in the wrong place.
- Even if Mr H succeeded on the boundary dispute, it wouldn't automatically follow that the hedge amounted to a trespass; the defendant might be able to show they had adverse possession.
- It might be better to use the procedure in the Antisocial Behaviour Act to get the hedge trimmed.
- The costs of doing this and/or costs of pursuing an alternative dispute resolution process should be covered, but not necessarily the costs of legal action. This would need to be kept under review.

In June 2021, Amtrust confirmed counsel's advice was positive and asked Mr H's daughter if he wanted to instruct his own solicitors to act for him. Amtrust said this would be subject to further information about whether the costs were proportionate and it would be for Mr H to obtain valuation evidence.

There was further correspondence about how to value the claim. Mr H's solicitors said the value was the cost of reinstating the boundary; Amtrust said it would be the difference in the

value of the land with and without the piece of land in dispute. Amtrust said it had to ensure the claim had prospects of success and the costs were proportionate before it would authorise costs

There was no agreement about the correct way to value the dispute. Amtrust didn't hear anything further until Mr H's daughter complained to this service in December 2022 and we referred it to Amtrust to consider.

In its response to the complaint Amtrust said:

- Cover is provided where a claim has reasonable prospects of success and the costs are proportionate.
- It obtained counsel's advice on these issues and was entitled to rely on that advice.
- It's for the policyholder to prove they have a valid claim. Mr H had to show the claim he was pursuing was covered by the policy and was likely to succeed.
- Mr H wanted the claim reopened and his costs covered. In view of how much time had passed it would be reasonable for him to provide a chronology of events since 2021 and if he did so it would review the claim in line with the policy terms.

Mr H's daughter remained unhappy and referred the complaint back to this service but our investigator didn't think it should be upheld. She didn't think Amtrust should have provided cover but even if it had agreed to this, it would have needed to agree terms of appointment with Mr H's solicitors before their costs would be covered. She said Amtrust's offer to review the claim if it was provided with a timeline of what had happened since 2021 was fair.

Mr H's daughter disagrees and has requested an ombudsman's decision.

### **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.

The policy covers costs for certain types of legal action. In this case, the relevant heads of cover are:

*Property Infringement: Advisers' costs to pursue a legal action for nuisance or trespass against the person or organisation infringing your legal rights in relation to your main home*

*Property Damage: Advisers' costs to pursue a legal action for financial compensation for damages against a person or organisation that causes physical damage to your main home or your personal effects.*

The policy terms say cover will only be provided where a claim has reasonable prospects of success. Most legal expenses insurance includes this requirement and I think it's reasonable – it wouldn't be fair to expect an insurer to pay legal costs for a case that's not likely to succeed. The policy explains this as follows:

*“At any time we may form the view that you do not have a more than 50% chance of winning the case and achieving a positive outcome. If so, we may decline support or any further support.*

*Examples of positive outcomes are:*

- a. Being able to recover the amount of money at stake.*
- b. Being able to enforce a judgment.*
- c. Being able to achieve an outcome which best serves your interests.”*

I'd expect an insurer to obtain legal advice on this and Amtrust did so. It referred the claim to panel solicitors, who advised the claim wasn't likely to succeed. But when Mr H provided his own solicitors' advice that disagreed with this Amtrust got a barrister's opinion, which is in line with industry practice in these circumstances.

Mr H's daughter says Amtrust should have opened the claim in line with Counsel's advice. But the advice was that costs of the procedure in the Anti-Social Behaviour Act would be covered but not necessarily the cost of legal proceedings, which would need to be kept under review. I can't see where he said a claim should have been opened and the legal costs all covered.

There was then some debate between Amtrust and Mr H's solicitors about the nature of the claim and how to value it. Amtrust said it would be the difference in the value of the land with and without the piece of land in dispute, while Mr H's solicitors said the true value in dispute was the cost of rectifying the boundary once a determination had been made by the court. There was also some discussion about whether Mr H was pursuing a claim for trespass or simply for a declaration of where the boundary was.

Mr H's daughter said they had decided to press ahead with his court claim and then make a complaint to Amtrust about his claim not being covered. There was then a long delay before the complaint was pursued, during which time court proceedings were pursued.

Amtrust said it was for Mr H to provide a valuation of the land in dispute. Since he had shown that he had a valid claim, it may have been reasonable for Amtrust to cover the cost of the report. But Mr H's daughter and his solicitors didn't agree that was the right way to value the claim in any event and decided to continue with the legal claim for a declaration of the boundary line. That type of application on its own wouldn't fall within one of the heads of cover set out above. And they pursued the litigation without any further involvement from Amtrust. It was their choice to proceed in that way. They could have made a complaint then and clarified the nature of the litigation and whether cover should be provided before proceeding.

Mr H's daughter is unhappy that Amtrust said the claim had to be pursued as trespass not a boundary dispute and said they didn't want to have to restart the whole process. But Amtrust only has to provide what the policy covers – a boundary dispute wouldn't be covered unless that is part of a claim for trespass or damage. Of course, it was for Mr H, his daughter and the solicitors to decide how to pursue his claim through the court. But Amtrust would only have to cover his costs if the claim was of a type that's covered under the policy terms and conditions.

From Amtrust's point of view, it had been told Mr H was claiming for a declaration of the boundary, which wouldn't be covered by the policy. Even if a valuation had been provided, Amtrust would still have needed to confirm the nature of the court case, confirm it was covered by the policy and agree terms of appointment with Mr H's solicitors before cover was put in place. The policy doesn't cover costs incurred before the claim has been accepted and cover agreed. None of that took place.

Mr H proceeded with his case in 2021 and Amtrust didn't hear anything further until January 2023. I know the situation has been very difficult for Mr H and his daughter and appreciate why they may not have found it easy dealing with everything. But in view of the amount of time that has passed and the fact Amtrust has had no involvement in the way the case has continued or the costs that have been incurred, I don't think it would be fair to expect it to pay those costs.

I note from the court documents that the claim is for a declaration of the boundary. But it also

refers to allegations of trespass and a claim for damages. It may be that would fall within the cover for trespass. However, Amtrust hasn't had the opportunity to consider that. In the circumstances its request to see a chronology of events since 2021 and offer to review the claim seems fair. If Mr H provides that information Amtrust can review the claim going forward. If there's still no agreement that could potentially be considered in a fresh complaint. But for the reasons given, the way it dealt with the claim in 2020 and 2021 was reasonable and as cover wasn't agreed nor terms of appointment agreed with Mr H's solicitors, it would not be reasonable to expect it to cover the costs incurred to date.

### **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 H to accept or reject my decision before 17 August 2023.

Peter Whiteley  
**Ombudsman**