DRN-4493987

The complaint

Mrs R and Miss R are unhappy Financial & Legal Insurance Company Ltd turned down a claim they made on their 'after the event' legal expenses insurance policy.

What happened

Mrs R and Miss R wanted to make a claim against a third party following a data breach. They approached solicitors who obtained counsel's opinion which put their prospects of success at 60%. He anticipated they would each recover damages in the £1,500 - £2,000 bracket. Through their solicitors Mrs R and Miss R took out an after the event legal expenses insurance policy with Financial & Legal (in October 2020) to cover costs in the event they weren't successful in their claim.

Later that month, their solicitors advised Financial & Legal the defendant had made an offer to settle the claim which it intended to reject and issue court proceedings. Financial & Legal confirmed its authorisation and proceedings were issued the following month. In July 2021 summary judgement was issued on the claim. The judge said there wasn't a credible case of establishing distress or damage over a 'de minimis' threshold. He awarded costs against Mrs R and Miss R on an indemnity basis.

The solicitors sought to recover those costs under the policy with Financial and Legal. It took some months for it to provide a detailed response to the claim. But it subsequently turned this down. It said it didn't understand why this case had been considered to have reasonable prospects of success (given judgements in other cases and the judge's comment on this one). It didn't think proceedings should have been pursued in the High Court.

It referenced policy terms that required a claim to be conducted with due diligence and as economically as possible. And that costs wouldn't be covered if proceedings had been conducted in such a way as to prejudice its position. It also said the policy didn't cover costs if the proceedings were struck out because of procedural error or default which it thought applied here.

Our investigator didn't agree. He noted the comments the judge had made about the case but the policy had been obtained based on a barrister's opinion which met the policy terms as they related to prospects of success. And Financial & Legal had been aware of that from the outset. So he didn't think the claim had been conducted in a way to prejudice its position. He didn't agree the claim had been struck out because of procedural error or default; it was struck out because the judge wasn't persuaded in relation to its merits. If Financial & Legal thought costs hadn't been reasonably incurred it could appoint an expert to consider this.

Financial & Legal didn't agree. It didn't think it was relevant there was a supportive counsel's opinion on the claim's prospects of success as the judge concluded the claim was misconceived and awarded costs on an indemnity basis. It drew attention to the comments the judge had made about the claimants not being able to demonstrate they'd suffered distress and thought it had been struck out for procedural error or default.

And the claim had been issued in the High Court which was an abuse of process and meant the claim hadn't been dealt with diligently and as economically as possible. It thought it should have been pursued in the small claims court.

I issued a provisional decision on the complaint last month. In summary I said:

The relevant rules and industry guidelines say Financial & Legal has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.

I've looked first at the terms and conditions of Mrs R and Miss R's policy. This does provide cover for "the payment of Opponent's Costs and Own Costs (where applicable) and Disbursements if the Proceedings are not Successful up to the Limit of Indemnity stated in the Schedule".

However, the policy doesn't provide cover "if the Proceedings have, in the Coverholder's opinion, been conducted in such a manner to have prejudiced the Insurer's position". And it doesn't cover costs "if the Proceedings are struck out due to procedural error or default". In addition the policy says "the Appointed Representative and/or the Insured shall conduct the Proceedings with all due diligence and as economically as possible". The policy defines 'Proceedings' as "the legal proceedings whether issued or not in relation to the pursuit or Defence by the Insured of a legal claim for compensation…"

Under 'Observance of Terms' the policy says "any term or condition of this Policy insofar as it relates to anything to be done or complied with by either the Insured or the Appointed Representative shall be conditions precedent to the Insurer's liability to make any payment under this Policy."

I've considered whether Financial & Legal has correctly and fairly relied on the exclusions and conditions it's referenced when declining cover for the claim. First, I don't agree the claim was struck out for procedural error or default. I've read the judgement carefully. I appreciate the judge was critical of the claimed impact on Miss R and Mrs R and said the time they'd claimed for in dealing with the matter was "plainly exaggerated".

But that doesn't represent a procedural error or default in my view. A procedural error would include a breach of a rule or practice direction (or something similar to that). That might include a failure to pay the correct fee or lodge proceedings in time. And a default would encompass the failure to do something required by law.

I don't see that either of those things have happened in this case. The judge reached a summary judgement that the case doesn't have a realistic prospect of success. He doesn't identify any procedural error or default which led him to do so; his judgement follows from his conclusion that the impact on Mrs R and Miss R of the data breach isn't as they have described and doesn't meet the 'de minimis' threshold for the case to progress.

Nor do I think Financial & Legal has shown the proceedings were conducted in a manner that's prejudiced its position. The argument it seems to be making is that that, based on the comments from the judge, the claim should never have been brought in the first place.

However, while I appreciate the judge clearly wasn't persuaded the case met the 'de minimis' threshold to be pursued, prior to proceedings being issued Mrs R and Miss R had obtained counsel's opinion on its prospects of success.

Financial & Legal say that isn't relevant but I don't agree. It's the basis on which the claim was accepted and was provided to Financial & Legal when authorisation to proceed was sought and agreed. And that opinion specifically considers relevant cases and concludes "the prospects of successfully establishing liability against the Defendant are in excess of 60%". Counsel went on to consider quantum in detail and said "I would anticipate the Claimants would each recover damages within a bracket from £1,500 to £2,000".

I recognise the judge clearly took a very different view but I don't see that shows the policy term as it relates to the conduct of proceedings has been breached. The decision on how to conduct the proceedings could only be taken based on the information available at the time. And in this case, I think the best available evidence was counsel's opinion which, in my view, is properly written and reasoned and from someone with specific experience of data breach and privacy issues. As I've said, counsel concluded the claim did have the required prospects of success, and Mrs R and Miss R were likely to recover damages. I don't see how taking steps in line with that advice gives Financial & Legal grounds to turn down the claim particularly as it provided authorisation for proceedings to be issued.

Where I do have a concern is in relation to whether the case was pursued as economically as possible. I can see proceedings were issued by Mrs R and Miss R in the High Court. Financial & Legal raised concerns in correspondence with Mrs R and Miss R's representatives as to why that was. In its final response to the complaint it said "we furthermore fail to understand why three claims worth only £2,000 maximum in your estimation were issued in the High Court". And "you should have known that these cases could not succeed at trial and certainly could not succeed in the High Court".

I think Financial and Legal had reasonable grounds for querying why the claims had been brought in the High Court given the breach by the third party wasn't in dispute and the claim was of relatively low value. I'm also aware there has been a relatively recent data breach case (Stadler v Currys Group Ltd [2022] EWHC 160 (QB)) in which the judge said "it would be disproportionate to allow such a low value claim to be litigated in the way that it is, with all the costs that arise out of High Court litigation. He went on to say "by including multiple causes of action in respect of this low value claim, the claimant has increased the complexity of the proceedings unnecessarily".

In a separate case brought in the High Court (Cleary v Marston (Holdings) Ltd [2021] EWHC 3809 (QB)) the judge said for a classic data breach case (which I think would encompass the issues raised in Mrs R and Miss R's claim) "it is important that claimants (and those advising them) do not pursue claims that add little but yet have the potential to make the case more complicated and lead to increased costs ultimately to resolve what in many cases will be a straightforward claim". He concluded that case should be allocated to the small claims track of the County Court.

I appreciate those judgements were reached after that on Mrs R and Miss R's case (though in the latter case only by a few months). But I note commentary on them indicates they reflect the direction of travel of judicial thinking which had been emerging prior to that. I accept there could nevertheless be good reasons as to why Mrs R and Miss R's case needed to be heard in the High Court. But having reviewed the responses provided by Mrs R and Miss R's representatives to Financial & Legal and to our service I can't see this issue has been addressed by them to date.

Given that I don't think it was unreasonable of Financial & Legal to conclude that, based on the available evidence, the case hadn't been pursued as economically as possible. Its view is the claim could have been pursued in the small claims court which reflects the outcome of the Cleary case quoted above. As there wouldn't have been the same costs issues with a case pursued in that way, I think it's reasonable to say Financial & Legal's position has been adversely affected because that wasn't done.

I also note that when Mrs R and Miss R's representatives sought authorisation for the case to proceed they didn't say that proceedings would be issued in the High Court. And while I appreciate that one of the Part 36 offers they attached did make reference to these being High Court proceedings I can't see that Financial and Legal provided explicit consent for the proceedings to be pursued in this way.

Of course, if Mrs R and Miss R's representatives do have further evidence as to why the claim was pursued in the High Court (and so why it was necessary to incur the costs associated with that), I'd expect Financial & Legal to consider those arguments. But that isn't something that would impact my decision on this complaint because I'm considering here whether Financial and Legal fairly turned down the claim based on the information that was reasonably available to it. And for the reasons I've explained I think it did. So there isn't anything I think it needs to do to put things right in relation to this complaint.

Responses to my provisional decision

Financial & Legal didn't respond. Mrs R and Miss R's representatives did provide comments. In summary:

- They explained why the claim had been issued in the High Court given the elements it included. They accepted subsequent case law suggested that wasn't appropriate but didn't accept this was apparent at the time.

- They argued it wouldn't have been economic for Financial & Legal to agree to the case being pursued in the small claims court as it wouldn't have been able to recover its premium and any damages would be unlikely to have covered this.

- They said Financial & Legal were aware from the papers submitted to it the case was being pursued in the High Court and confirmed they could proceed. They thought it was now estopped from going behind that agreement.

So I need to reach a final 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.

Mrs R and Miss R's representatives have argued Financial & Legal is estopped from declining the claim because it was aware proceedings were to be lodged in the High Court and agreed they could go ahead. And while I appreciate there are different types of estoppel in simple terms it's a legal principle where someone is 'estopped' from arguing something or asserting a right that contradicts what they've agreed to previously.

However, while I must have regard to the law, I don't have to apply it strictly in the same way a court would. My role is to decide what's fair and reasonable in all of circumstances of the case.

I identified in my provisional decision that one of the Part 36 offers Mrs R and Miss R's representatives attached when seeking authorisation for the case to proceed said these were High Court proceedings. But I also took into account that they didn't refer to this in their covering email and Financial & Legal didn't give explicit consent for proceedings to be issued in that way. So I don't think it's fair to say it had agreed to this.

Mrs R and Miss R's representatives have also provided the rationale for why they did lodge proceedings in the High Court. In my provisional decision I explained that if they were able to evidence why they'd done so (and so why it was necessary to incur the costs associated with that) I'd expect Financial & Legal to consider those arguments.

But I also made clear that wasn't something which would impact my decision on this complaint because what I was considering was whether Financial& Legal fairly turned down the claim based on the information that was reasonably available to it. It hasn't yet had the opportunity to consider the arguments Mrs R and Miss R's representatives have now made. So they'll need to put those points to Financial & Legal in the first instance.

I'd expect Financial & Legal to then review that information to see if it makes a difference to its current position on the claim (taking into account the comments I made in my provisional decision as to why I didn't think the other grounds it had used for declining the claim could fairly be applied). If Mrs R and Miss R are unhappy with any new decision Financial & Legal then reaches that's something we could potentially consider as part of a fresh complaint.

My final decision

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R and Miss R to accept or reject my decision before 8 January 2024.

James Park
Ombudsman