DRN-4459283

The complaint

Mr C complains that Financial & Legal Insurance Company Ltd ("F&L") did not provide cover for legal costs following a claim on his after the event ("ATE") legal expenses insurance policy.

Where I refer to F&L, this includes it agents and claims handlers acting on its behalf.

What happened

Mr C instructed solicitors to act for him in relation to a professional negligence claim. He entered into a conditional fee ("no win no fee") agreement with the solicitors and took out ATE insurance with F&L to cover disbursements and his opponents' costs if his case was not successful.

Proceedings were issued. Mr C and his solicitors had a conference with counsel shortly before the trial date. Counsel advised that his claim was not likely to succeed and said they should try to settle or if that wasn't possible, discontinue the case.

The solicitors tried to negotiate but the defendant was not willing to settle and said it would proceed with the trial. The solicitors emailed F&L saying they intended to discontinue the claim and sought F&L's consent to this, saying they needed an urgent reply the same day before further costs were incurred.

F&L didn't reply but the solicitors went ahead and discontinued the claim to avoid further costs.

As the case was discontinued, Mr C became liable for the defendant's costs. When he sought to claim on the policy F&L rejected the claim. It said Mr C had breached the terms of the policy, in particular by discontinuing the case without obtaining its consent.

The solicitors reached an agreement with the defendant to pay £35,000. As F&L had refused to indemnify Mr C, the costs were paid by the solicitors and their professional indemnity insurers.

Mr C complained about F&L's refusal to pay the costs but F&L said it had acted in line with the policy terms. F&L made a number of points, including:

- it was a requirement for cover to be provided that the chances of success were at least 60% and following the conference with counsel it was clear the chances of success were low;
- Mr C should have notified F&L of this change but failed to do so;
- the solicitors only contacted F&L at the last moment, needing a reply the same day, which didn't allow it time to make an informed decision; and
- the solicitors should not have discontinued the case without its consent.

Mr C referred his complaint to this Service. Our investigator said F&L should not have rejected the claim because

- whether or not the solicitors should have contacted F&L sooner, it would have been

unreasonable to decline the request to agree to discontinue the claim, and the late notification didn't cause F&L any prejudice;
- F&L said it was entitled to void the policy entirely but that would only be the case where Mr C failed to disclose something material to the conduct of the proceedings, which wasn't the case here;

But the investigator said Mr C hadn't suffered any loss as the costs had been paid and it was unlikely the solicitors or their insurer would try to recover those costs from him. So he didn't think F&L needed to pay anything.

Neither party has accepted the investigator's view.

F&L says it was entitled to reject the claim, and it was prejudiced as it was denied the chance of the case proceeding to court and winning, which would have reduced its loss.

Mr C says it's not clear on what basis the investigator can say he won't be pursued for the costs, and in other similar cases the ombudsman has upheld the complaint.

As no agreement has been reached I need to make a 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 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 provides cover for disbursements and for the defendant's costs. But as with all insurance there are policy terms and conditions that limit when cover will be provided. F&L has relied on conditions which say

- Mr C had to notify it as soon as reasonably practical of any material changes;
- costs will only be paid where the court has ordered Mr C to pay costs or it has agreed to terms of settlement in circumstances where the claim no longer has a reasonable chance of success;
- there's an exclusion that applies where proceedings are compromised or discontinued unless it has given its written consent, which will only be done where the solicitors advise there is no reasonable prospect of success.

F&L says Mr C or his solicitors should have contacted it after the conference with counsel to say the advice was that his case no longer had a reasonable chance of success, and should not then have discontinued the claim without its consent.

I agree that F&L should have been told about the change in circumstances. But that doesn't mean it was reasonable for F&L to reject the claim, nor would that be grounds to void the policy.

The solicitors were attempting to settle the case on the best possible terms. Once it became clear the defendant would not agree to settle they concluded the best option was to discontinue and contacted F&L. And they did provide an update before then in the form of a spreadsheet with brief descriptions of where each of the solicitors' cases were. For Mr C it said, "*On-going but may need to be discontinued if no offers – no limitation issues*."

F&L says it was prejudiced, because it would have advised to continue to trial; it says the costs had almost reached the indemnity limit so it wasn't likely to have to pay more and there was a chance it could limit its loss.

But cover is only provided if the claim has a reasonable chance of success. Indeed, if Mr C had continued to trial without telling F&L that his case was no longer likely to succeed, F&L would no doubt have said he was in breach of the policy terms. F&L can't have it both ways – saying Mr C should have told it earlier that his case no longer had prospects, but then expecting him to proceed to trial anyway. Particularly when the policy terms required him to keep costs to a minimum.

The costs were settled for £36,000, well under the indemnity limit of £50,000. If the trial had gone ahead, the likely outcome would have been not only that Mr C would have lost, but that the costs would have been considerably higher – most likely above the indemnity limit, leaving Mr C having to pay costs himself.

It would not be fair to expect Mr C to pursue his case where he was likely to lose. The terms say F&L will not withhold consent to discontinue unreasonably. It would have been unreasonable to withhold consent in these circumstances.

But having said all that, there is no loss to Mr C. The costs have been paid and there's nothing to indicate he is being pursued for those costs. He's referred to decisions in other complaints but every case is considered on its own circumstances. The circumstances here are that Mr C hasn't had to pay any costs and is not likely to.

He also says he's suffered distress and inconvenience – if the solicitors or their insurers hadn't paid the costs he would have faced court proceedings against him personally, and this would be stressful for anyone. I agree that would be distressing if it happened. But this hasn't happened. So, based on what he's said, I'm not satisfied F&L has caused him such distress and inconvenience to justify compensating him.

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 C to accept or reject my decision before 5 January 2024.

Peter Whiteley
Ombudsman