

The complaint

Mr and Mrs B are unhappy Amtrust Europe Limited withdrew cover for a legal expenses claim they'd made.

What happened

In April 2021 Mr and Mrs B made a claim on their legal expenses insurance with Amtrust. This related to a professional negligence claim they wanted to bring against tax advisers. During a review of their financial arrangements in February 2021 their accountants told them a family trust they'd been advised to set up in 2008 didn't provide any benefit. And they should pursue a negligence claim against the advisers who suggested they do this.

Amtrust initially turned down the claim as it thought Mr and Mrs B were aware of the act or omission giving rise to it prior to the start date of this policy (July 2020). Mr and Mrs B provided further information and, having obtained counsel's opinion, Amtrust accepted Mr and Mrs B weren't (and shouldn't reasonably have been) aware of the potential negligence prior to taking out the policy. It agreed to cover the claim. But if said if it subsequently came to light Mr and Mrs B did have knowledge of potential negligence prior to the policy inception date it would withdraw cover.

As counsel also confirmed the claim had reasonable prospects of success (a requirement of the policy) matters progressed. In September 2022 the panel solicitors acting on the case provided an update to Amtrust and included a further counsel's opinion on the issue of when limitation expired. The panel firm drew Amtrust's attention to a number of points in relation to policy coverage and Mr and Mrs B's date of knowledge. Having reviewed those Amtrust said the latest counsel's opinion "*does seem to cement the most likely date of knowledge as 1st of November 2019*". It said it would be withdrawing cover for the claim.

Our investigator didn't think Amtrust had acted fairly. She accepted it was entitled to rely on legal advice and the September 2022 email from panel solicitors did flag issues relating to policy coverage. But that advice (and the further counsel's opinion) weren't materially different to the information Amtrust had when it agreed to cover the claim in August 2021. She thought Amtrust should reinstate cover for the claim (and cover any claim related legal costs Mr and Mrs B had incurred since it was withdrawn).

Mr and Mrs B agreed with her outcome and made some further points in support of their position. Amtrust didn't agree. In summary it said:

- It thought if the claim had been declined at the outset it would have been criticised for not allowing Mr and Mrs B the benefit of the doubt and carrying out a proper investigation before coming to that decision. It agreed funding for the claim while that further information was obtained.
- The second counsel's opinion was formed following further disclosure of information and supported the original assessment. And the panel solicitors advised there was now additional support for the argument the claim pre-dated the policy and cover should be withdrawn.

- If we were suggesting the claim should have been rejected following the first counsel's assessment then it should have the right correct that mistake and withdraw cover following the further advice from counsel. If that was the case Mr and Mrs B would have received a large amount of legal advice and cover under the policy which Amtrust had funded and which they weren't entitled to.

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.

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

Amtrust has relied on the 'pre inception' term in the policy which says cover won't be provided for *"any actual or alleged act or omission or dispute happening before, or existing at the start of cover under this section and which the insured believed or ought reasonably to have believed could lead to a claim under this section"*.

The act or omission which is the subject of this claim is the alleged negligence by Mr and Mrs B's tax advisors when setting up their family trust. That took place in 2008 so was clearly prior to the start date of this policy which was July 2020. The issue is therefore when Mr and Mrs B believed (or ought reasonably to have believed) that issue could lead to a claim on this policy.

Amtrust initially turned down the claim because it said Mr and Mrs B were aware of the tax liability which prompted their negligence claim in September 2018. Mr and Mrs B challenged that decision and provided a chronology setting out what had happened. Amtrust provisionally accepted the claim on 16 July 2021 and said it would refer the matter to panel solicitors for further assessment.

So I agree at that point it had only accepted the claim subject to legal assessment and any further investigations required for that assessment. But the following month, and having obtained and provided counsel's opinion, the panel solicitors asked Amtrust if it would fund the litigation (including a fee to issue proceedings). I think by that point the assessment Amtrust asked for had been completed. And Amtrust agreed to fund the claim. It didn't ask for any further investigation into when Mr and Mrs B were aware of the potential claim and said *"ultimately, as you say, neither us, you, or counsel have seen evidence that the insureds were aware, or ought reasonably have been aware of potential negligence before the policy inception of 19th July 2020"*.

Amtrust did make clear that its position on funding was on the proviso Mr and Mrs B's date of knowledge of potential negligence was August 2020 at the earliest. And it said if came to light they had pre-existing knowledge of potential negligence prior to the policy starting it would withdraw cover.

The complaint Mr and Mrs B have made is about Amtrust's subsequent decision to do so. Given what it said when agreeing cover I think it's fair to take into account whether that was because information it wasn't previously aware had come to light. If that was the case I think Amtrust would, in principle be entitled to withdraw cover given it made its position on this clear when agreeing funding.

The difficulty for Amtrust is that I don't think there was materially different information available to it in September 2022 compared to August 2021. I've reviewed the second counsel's opinion which identifies the only new and material piece of information as a description by the other side's solicitors of a letter to HMRC (in August 2018) which it doesn't appear Mr and Mrs B were aware of. Counsel says "*my view on limitation remain as set out in my previous advice*" albeit he goes into more detail as to the exact date that might expire.

When the panel solicitors wrote to Amtrust enclosing that opinion and drawing attention to policy coverage issues they didn't suggest this was new information. In fact they referenced the initial counsel's opinion of August 2021 and points they'd made in an email sent to Amtrust at that time. But Amtrust decision to agree cover was taken having reviewed the August 2021 opinion and after considering the points the panel firm made about this. So, while Amtrust would have been entitled to withdraw cover if information it hadn't previously been aware of had come to light, I don't think that's the case here.

Amtrust has said if we thought the original claim acceptance was wrong it should be allowed to correct that mistake. However, I'm considering in this decision whether it was fair of it to withdraw cover for the reasons it gave. Amtrust hasn't accepted in its response to the complaint or to us that its original decision was wrong.

In fact, as I understand it, Amtrust believes its decision to accept the claim was correct and it only withdrew cover when new evidence became available. It's told us "*it followed the advice provided to us by solicitors, and I cannot agree it was incorrect for us to do so*". However, for the reasons I've explained I don't think the position as put forward by counsel and solicitors was materially different in September 2022 from that in August 2021 (when Amtrust accepted the claim having reviewed the legal advice). And so I don't think its decision to withdraw cover for the reasons it gave was correct or fair.

Putting things right

Amtrust will need to reinstate cover for the claim and cover this (subject to it continuing to meet the remaining terms and conditions of the policy). It will also need to cover any reasonable and necessary claim related costs Mr and Mrs B incurred during the time cover was withdrawn.

My final decision

I've decided to uphold this complaint. Amtrust Europe Limited will need to put things right by doing what I've said in this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs B to accept or reject my decision before 21 August 2023.

James Park
Ombudsman