

The complaint

Mr H and Mr M are unhappy with what Amtrust Europe Limited did following claims they made on their legal expenses insurance policy in relation to disputes with their neighbours.

What happened

Mr H and Mr M contacted Amtrust about difficulties with their neighbours in October 2018. I decided a previous complaint about what happened between then and October 2020 when counsel's opinion was obtained on the claim's prospects of success. That opinion found only a property damage element of the claim had reasonable prospects of success but Mr M would need to provide further information on who was responsible for that damage.

Subsequently Amtrust agreed to fund counsel's opinion on whether a claim relating to property damage caused by access issues would have reasonable prospects of success. In June Mr M and his solicitors advised Amtrust of further developments which included issues relating to a water supply and a planning application made by the neighbours. His solicitors sought Amtrust's views on this and requested further funding for counsel's opinion.

Amtrust expressed concern at the amount of funding already committed on a claim that hadn't yet been accepted. Mr M was also concerned about this and subsequently told Amtrust he had instructed an alternative firm of solicitors. Amtrust advised in July that Mr M should contact it if prospects of success for his claim were confirmed. And if the claim was proportionate to pursue it could look to cover costs retrospectively (subject to these being assessed). However, it said it wouldn't be providing further funding at this stage.

Mr M's new solicitors contacted Amtrust and it provided clarification as to the indemnity limit remaining under the policy. In June 2022 Mr M's solicitors provided counsel's opinion to Amtrust (dated December 2021). They sought funding to defend a compensation claim that had been made against Mr M (relating to the water supply) and a claim made against Mr H for harassment. And they queried whether the policy would cover a claim relating to an extension at the neighbour's property.

Amtrust said the dispute in relation to the proposed extension (and other matters covered in that opinion) weren't covered by the policy. And the policy didn't cover the defence of a claim. It would only consider funding a defence claim where the insured had a counter claim which was inextricably and inseparably linked to it. The only claim the policy might cover was an action to force the neighbour to remove a car that was restricting Mr M's access to his property. But counsel hadn't confirmed this claim enjoyed reasonable prospects of success in percentage terms. So it didn't think cover was available for this.

Our investigator agreed the defence of a claim wasn't covered under either the property infringement or property damage sections of the policy. It might be fair for Amtrust to cover it where the insured had a counter claim but he thought there would need to be relationship between the claims. He didn't think that was the case here. So although the defence claim was assessed by counsel as having reasonable prospects of success he didn't think Amtrust acted unfairly in not providing funding for this. And he agreed there wasn't cover for the claim relating to the extension the neighbours were building.

However, he thought it Mr M wanted to pursue the access claim that could be covered under the terms of the policy. And although counsel hadn't expressed his opinion in percentage terms he thought he had confirmed it would enjoy reasonable prospects of success. So he thought Amtrust should consider that claim against the remaining terms of the policy. Amtrust said having reviewed counsel's opinion it didn't think it was clear there were prospects of success for this claim. And it was reasonable of it to ask for prospects of success in percentage terms. Mr M expressed concern about the overall handling of the claim and said Amtrust had changed position on the circumstances in which they'd consider the defence of a claim.

Our investigator issued a further view in which he said:

- Given the amount Amtrust had spent on the claim without prospects having been confirmed it was reasonable of it to say in June 2021 it wouldn't be providing further funding until that was confirmed.
- Amtrust had changed its position in relation to the circumstances in which it would fund the defence of a claim. But he explained why he didn't think it would in any case be fair to expect it to do so on the basis of the criteria it initially set out.
- Mr M's concerns about what damage should be covered under the provisions of his home insurance policy (which was underwritten by a different insurer) didn't form part of his complaint.
- Mr M's concerns about the actions of the law firms involved in the matter weren't something we could consider.
- In relation to Amtrust's point about the clarify of counsel's opinion he said if it had wanted to establish prospects of success in percentage terms it could have clarified that with counsel itself.

Mr M told us he didn't have further comments as the points he'd made had been considered; he also welcomed clarification our investigator provided about the actions of the second firm of solicitors involved in the case.

Amtrust didn't agree. It said it had spoken to panel solicitors who didn't agree counsel had confirmed prospects of success for the access claim. And as they weren't the client of counsel they weren't able to approach him themselves; this was something Mr M would need to do.

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

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

I appreciate this matter has been ongoing for some years and it has clearly caused both Mr M and Mr H considerable distress. I'm aware of Mr M's significant health problems which I don't doubt will have exacerbated the impact of all this on him. But the question for me is whether there have been any failings by Amtrust in period I'm considering (since October 2020). And what the impact of any failings has been on Mr M and Mr H.

Having reviewed the file it does seem to me that a number of the points Mr M has raised relate to the actions (or inactions) of the solicitors acting for him. That isn't something

Amtrust is responsible for. As our investigator explained those are matters he can raise with those firms and potentially the Legal Ombudsman if he's unhappy with their response.

Turning to the actions of Amtrust I can see our investigator addressed the concerns Mr M raised about this in correspondence with him. Mr M hasn't disagreed with those points in the further response he then provided. And I agree Mr M and Mr H haven't lost out as a result of anything Amtrust got wrong.

In particular I appreciate Amtrust did agree to obtain a further counsel's opinion (and authorised funding for this). But it appears that funding paid for costs Mr M's solicitors had incurred. Amtrust had concerns about whether this fell within expenditure it had authorised. It appears Mr M also concerns about that firm's expenditure which led him to instruct an alternative firm. I don't think it was unreasonable of Amtrust to say it wouldn't be providing further funding at that stage given that prospects of success hadn't been confirmed despite costs of over £20,000 being incurred. I appreciate there might be questions over how Mr M's solicitors spent the funds which Amtrust authorised but I think that's something he'll need to raise with that firm if he hasn't already.

I also think it was reasonable of Amtrust to say if it was established the claims had prospects of success and were proportionate to pursue it would look to cover costs retrospectively. I don't think in doing so Amtrust was making a commitment to cover all future claims which had prospects regardless of whether they were covered by the policy; the starting point for any claim (and prior to a consideration of prospects) is always whether an insured event under the policy has taken place.

Mr M also says Amtrust had changed its position on the circumstances in which a defence claim would be covered. Amtrust did say in July 2021 that it would consider funding a defence claim if "you are counterclaiming or could have issued a claim for nuisance, trespass or damage first." That is different to what it said a year later when it told Mr M it would only cover "a Defence that satisfies all policy requirements where the Insured has a counterclaim and they are inextricably, inseparably linked."

The starting point here is that the relevant sections of the policy only cover the pursuit of claims. So defending a claim isn't covered. But I agree in some circumstances it might be appropriate to do so on a fair and reasonable basis. And I wouldn't necessarily agree those claims need to be inextricably and inseparably linked in order for that to be the case. But I do think there needs to be a reasonably close connection between them. That isn't the case here; for example I don't think there is a close enough relationship between the claims made against Mr M and Mr H and the access claim. So even on the basis of the broader criteria Amtrust set out in July 2021 I don't think it would be fair to ask it to fund the defence claims.

I think the outstanding issue for me to determine is in relation to the access claim (I understand this relates to the neighbour's car which Mr M argues impedes his access to a gate). Amtrust said counsel's opinion didn't confirm prospects of success for a claim relating to this so it wouldn't provide funding for it.

And in common with other legal expenses policies it's a condition of Mr M's that for cover to be provided a claim does have to have reasonable prospects of success. The policy says "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".

So the policy does define prospects in percentage terms and I don't think it's in dispute that counsel hasn't expressed his opinion on prospects in that way. But if it was nevertheless clear from wording of the opinion that the claim did have reasonable prospects of success

(even if that wasn't explicitly stated as a percentage) I think that should have been accepted by Amtrust.

I've reviewed counsel's opinion and I don't think that is the case here. The opinion does say "there is no right to park in a way that permanently impedes use of the gate". However, it goes on to consider whether the car is in fact parked and concludes that arguably it's stored. I can't see the opinion then reaches a clear conclusion as to what that means for the claim's prospects of success. It does conclude "there will be a right if necessary to compel removal of the permanently parked car..." but it doesn't give any context to the circumstances in which that might be the case. I also understand Amtrust has consulted its panel solicitors who didn't agree prospects of success for this claim had been confirmed by counsel.

So I don't think Amtrust should have accepted the claim on the basis of this opinion. And I can see when it responded to Mr M's solicitors it said its reason for not funding this claim was because prospects hadn't been confirmed in percentage terms. But arguably it could have done more to clarify this either by asking for Mr M's consent to approach counsel or asking him to obtain more information on this point.

However, I'm not persuaded Mr M lost out because it didn't do that. His solicitors said in response to Amtrust's email the access issue wasn't the subject of any current action and wasn't something he was seeking cover for. I can also see our investigator suggested to Mr M that if he did want to pursue this issue it might be helpful to ask counsel to express the prospects opinion in percentage terms. It doesn't appear he's done that. If Mr M does want to pursue this element of the claim it remains open to him to obtain clarification from counsel on this. But unless he does that I don't think there's more Amtrust needs to do here.

Responses to my provisional decision

Amtrust said it had no further comments. Mr H and Mr M didn't respond.

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.

As neither party has provided comments which impact what I said in my provisional decision I don't have any reasons to alter the conclusions I set out in it.

My final decision

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Mr M to accept or reject my decision before 10 August 2023.

James Park
Ombudsman