

The complaint

Miss J is unhappy Society of Lloyd's (Lloyds) didn't pay a claim for reimbursement of adverse costs she made on an 'after the event' (ATE) legal expenses insurance policy.

What happened

In March 2016 Miss J took out an ATE legal expenses policy with Lloyds through solicitors in relation to a personal injury claim. Matters progressed and a court hearing took place in July 2017. Following that, her solicitors advised Lloyds there had been inconsistencies in the evidence Miss J gave and the claim had been discontinued as an alternative to a formal finding of fundamental dishonesty being made against her. They said the defendant would be seeking their costs and asked if the policy would cover this.

Having reviewed an attendance note from Miss J's counsel, Lloyds said it was concerned with the reasons that led to discontinuance. And it would be declining the claim on the basis of clause 8 of the policy (which related to fraudulent claims) and clause 9 (which covered a failure without good reason to meet responsibilities). So Miss J would be responsible for any costs or disbursements incurred.

In February 2018 a District Judge found Miss J had been fundamentally dishonest and the defendant was entitled to enforce the costs order made in his favour. The following January Miss J paid the defendant's costs (including their appeal costs). As a result a consent order was issued setting aside the previous order.

Solicitors acting for Miss J contacted Lloyds in April 2021 and said they were now instructed in professional negligence proceedings against Miss J's former solicitors. They sought reimbursement of the adverse costs she'd paid as the finding of fundamental dishonesty had now been set aside. Lloyds said the finding of fundamental dishonesty had been set aside because Miss J had agreed to pay adverse costs. As a result no finding had been reached on this issue. So it maintained its previous reasons for declining the claim. It also said Miss J hadn't sought any agreement from it before agreeing to pay costs which was a breach of the policy terms.

Our investigator thought Lloyds had acted fairly. Miss J didn't agree. In summary she said:

- The finding of fundamental dishonesty resulted from negligence by her solicitors. She didn't accept she had been dishonest and believed an appeal against the order finding that would have been successful. And as it had been set aside it no longer existed so Lloyds couldn't rely on this.
- She'd already been told her ATE policy wouldn't assist with the claim so she didn't believe it was necessary to obtain Lloyds's agreement to pay the other side's costs; it wouldn't have been possible for her to get permission to incur fees on a claim that had already been rejected.

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 Lloyds has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.

I appreciate this matter has caused Miss J a great deal of distress and I was very sorry to learn of the impact of that on her. However, the issue I need to consider is whether Lloyds has done anything wrong. And while I appreciate matters relating to this claim have been ongoing since Miss J took out this policy in March 2016, the complaint she's made to us is about Lloyds decision not to reimburse the costs she paid. So that's the issue I've focussed on in this decision.

I've looked first at the terms and conditions of her policy. Section 8 'Fraudulent Claims' says *"if you make a claim which is fraudulent or false this policy shall become void and all benefit under it will be forfeited"*. And Section 9 'Cancellation' says *"The insurer will cancel this policy immediately without any refund of the insurance premium, and will reclaim any payments made under this policy if...you fail without good reason to meet any of your responsibilities under this policy"*.

Lloyds decided in 2017 Miss J was in breach of those terms (and withdrew cover as a result). Miss J argues it should revisit its decision because she believes it was negligence by her solicitors that led to the discontinuance of her claim and the finding of fundamental dishonesty. And she said she wasn't dishonest in the evidence she gave.

I appreciate the fundamental dishonesty finding was set aside by consent in January 2019. And I understand the points Miss J has made about why she agreed to that and didn't pursue an appeal. But that does mean no finding was ultimately reached on whether Miss J had been fundamentally dishonest or not. So there was no successful appeal for Lloyds to take into account when reviewing its previous decision to decline cover.

And Lloyds turned down the claim in 2017 which was before the order relating to fundamental dishonesty had been reached. So that can't in itself have played a part in its decision to do so. The evidence it did have was a detailed hearing note from counsel which identified a significant number of inconsistencies in the evidence Miss J provided both prior to the hearing and during cross examination which, in a number of instances, she wasn't able to explain.

I appreciate Miss J may well disagree with that advice and I understand she believes what happened at the hearing resulted from the negligence of her solicitors. But I'm not aware she's been successful in that claim to date and obtained a judgement supportive of her view. Nor does she appear to have provided Lloyds with any other legal opinion in support of her position. So I don't think it was unreasonable of Lloyds to maintain its previous position on the claim given there wasn't clear evidence to show that was based on incorrect information.

Even if Miss J was able to show that I don't think that would mean Lloyds should reimburse costs she's already paid. The policy terms say *"you must not negotiate, settle the claim or agree to pay any costs incurred without our written agreement"*.

I do understand that at the point Miss J incurred those costs her claim had been rejected. And I think it's likely that if she had approached Lloyds for authorisation it would simply have told her this wasn't a matter it could become involved with. But I think the key point here is that's because no cover was in place for her claim. I haven't seen clear evidence to show the decision Lloyds reached to decline cover in 2017 was wrong based on the information it had

at that time (Miss J hasn't challenged that in her complaint to us). And solicitors acting for Miss J didn't get in touch with Lloyds until 2021 which was itself over two years after the costs had been paid by Miss J.

Given that, even if Miss J is now able to provide new evidence which shows cover for this claim should be reinstated (and I'm not sure there are any ongoing issues), I don't think it would be fair to expect Lloyds to retrospectively cover costs incurred which it had no oversight or control of and which relate to a period when cover wasn't being provided.

Miss J has also raised some more general questions about coverage provided by ATE policies. I think most of these are best directed to Lloyds as it's best placed to answer them (and I think some of these points have been addressed in correspondence with her current solicitors). Miss J might in addition find it helpful to look at the legal expenses insurance section of our website if she wants further information on what our approach to these matters might be (for example when an insurer can rely on the assessment of prospects of success produced by a solicitor).

My final decision

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Miss J to accept or reject my decision before 3 August 2023.

James Park
Ombudsman