

## **The complaint**

A company that I'll refer to as G has complained that Amtrust Europe Limited unfairly withdrew indemnity for a claim on its legal expenses insurance policy.

Mr H, a director of G, has brought the complaint on G's behalf. G is also represented in bringing this complaint however, for ease of reading, I'll refer to all actions and comments as being those of G.

G is in administration and the administrator has consented to G bringing this complaint.

For ease of reading, reference to Amtrust will include anything done by their agents.

## **What happened**

G held a business protection insurance policy. The policy contained legal expenses insurance cover with Amtrust. Other parts of the business protection policy were insured by different insurers.

G claimed on its policy in 2018 as it wanted to appeal a decision made by a regulatory body.

G said there were delays in dealing with the claim but Amtrust ultimately accepted the claim in December 2018. There was ongoing discussion between G and Amtrust over the following months however, in August 2019, Amtrust withdrew indemnity because G was in administration. Amtrust said as G had been in administration since 2018 the claim shouldn't have been accepted but, due to their error, they would honour costs previously incurred.

In September 2019 Amtrust appointed a firm of cost assessors to assess the amount payable under the claim. There was some dispute about who should pay for the paper files to be sent to the cost assessor but Amtrust ultimately agreed to pay for this. G disputed the amount offered by Amtrust and was unhappy that the cost assessors hadn't reviewed the paper files as it thought they were relevant. The cost assessor said they hadn't realised the paper files were relevant and Amtrust offered a review of the costs in light of this.

Following lengthy discussions between the parties Amtrust and G reached an agreement on the costs. However, G didn't think it was fair that it had incurred significant legal costs in disputing the costs.

G complained to Amtrust. It said it had incurred costs and inconvenience due to Amtrust's errors and as such Amtrust should continue to provide indemnity. G didn't think it was fair or reasonable for Amtrust to remove indemnity in the month before the hearing. G said that given the time and money spent on the case it had no option but to self-fund the case through to the hearing. G also complained about how Amtrust had dealt with the costs. When Amtrust refused to indemnify G for the remaining costs, G brought its complaint to our service. It complained:

- About delays in Amtrust initially taking on the claim.

- That Amtrust had a term in their policy which allowed them to remove indemnity if a company went into administration.
- That Amtrust had removed indemnity in August 2019.
- That the policy includes a term which allows Amtrust not to reimburse any costs until after legal proceedings have been concluded.
- That Amtrust's handling of the recovery of G's costs has been obstructive, unfair, hostile and at times misleading.

Our investigator explained to G that we couldn't consider any of its complaints which arose from an act or omission that took place before 1 April 2019. He said he'd considered Amtrust's actions in removing indemnity for the claim, but he didn't think Amtrust had acted unreasonably in doing so and as such didn't think Amtrust were liable to pay any further costs.

G didn't think this provided a fair and reasonable outcome and asked for an ombudsman's decision.

I issued a provisional decision on this complaint on 17 February 2022. In that I said:

*I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.*

*G has made a number of detailed complaints. While I've considered all of them I'm not going to address them all in this decision and will instead focus on what I consider to be the central issues in this complaint.*

*What I will consider in this decision*

*G has complained about a number of separate businesses. In this decision I can only make a finding on anything done by Amtrust and their agents. Any complaint about an act or omission by a different company would need to be considered separately. Our investigator has informed G which parts of its complaint relate to other businesses and therefore I'm not going to comment on them in this decision.*

*As G has disputed whether our service is able to consider all of its complaint I will explain why I can't make any award for any errors in Amtrust's acts or omissions before 1 April 2019.*

*For us to be able to consider G's complaint we need to have jurisdiction to do so. To put it simply, we can only consider a complaint if our rules allow. Our jurisdiction is set out in DISP 2 and one of those rules is that the complainant must be eligible to bring the complaint to our service.*

*DISP 2.7.3R sets out who is eligible to bring a complaint to our service. In relation to businesses, our rules state that the business needs to be a 'micro-enterprise' or a 'small business' to be eligible to refer a complaint here.*

*However, while a micro-enterprise has been able to bring a complaint to us for some time, a small business can only bring a complaint to us about an act or omission by a financial business that happened on or after 1 April 2019. It's not in dispute that G was a small business at the time it complained to Amtrust which means that I can only make an award in response to acts or omissions that took place from 1 April 2019. This means that I can't consider G's complaints in regard to Amtrust's delays in accepting the claim and I can't make any award for Amtrust making a mistake and incorrectly providing indemnity for G's claim. I can however consider Amtrust's decision to withdraw indemnity for the claim and*

*whether Amtrust acted fairly and reasonably in how they handled G's costs.*

#### *The claim*

*The terms of G's policy say that Amtrust can withdraw indemnity if a policyholder business goes into administration. I don't find this term unfair or unusual and it's not in dispute that G was in administration at the time of the claim. So, under a strict application of the terms of the policy, Amtrust was entitled to remove indemnity for the claim. However, I don't think it was fair and reasonable for them to do so. I'll explain why.*

*Amtrust don't think that G was prejudiced by the withdrawal of indemnity. They said that G had received payment for a significant proportion of the claim that it wouldn't have received if they hadn't made an error.*

*While I can't make an award for Amtrust's error in accepting the claim, I can make an award for any act or omission that happened after 1 April 2019. In this case I think Amtrust should have noticed its error sooner as it was always aware that G was in administration, so I've thought about what would have happened if it had let G know sooner that its claim wouldn't be covered.*

*G said that it waited for cover to be confirmed by Amtrust before initially going ahead with the case and that if Amtrust had withdrawn indemnity in April 2019 it wouldn't have continued with it. However, G said that given the costs it had incurred and the time it had spent on the case between April and July, it decided that it had little option but to continue to the hearing when indemnity was withdrawn in August 2019. G said that during this time Mr H and his daughter spent weeks going through evidence held by the company's administrators which meant a cost in both time and money as G also had to pay for a member of the administrator's staff to supervise their access to the materials.*

*I'm persuaded by what G has said as it had spent considerable time and money on the claim between April and July. I understand G was also funding some of the solicitor's fees itself, so it had also incurred costs between April and July. If G had decided to abandon the claim in August it would have lost that money without having reached the appeal. While G also paid out for costs incurred between December 2018 and April 2019, I'm persuaded that the accumulation of these costs and the time involved meant he was more likely to continue with the appeal in August than he would have been if indemnity had been withdrawn sooner. Having taken all of this into account, I'm persuaded that Amtrust withdrawing indemnity in August caused G a loss that it wouldn't otherwise have had if Amtrust had removed indemnity on 1 April.*

*Therefore, I think it's fair and reasonable for Amtrust to compensate G for its loss. I have considered whether it would be fair and reasonable for me to require Amtrust to reimburse G for the money it spent on the claim between April and July instead, but I don't think that would produce a fair and reasonable outcome as that wouldn't adequately compensate G for the time it worked on the claim during that time.*

*In order to put things right, I think the fair and reasonable outcome is for Amtrust to reimburse G for any further costs it would have paid on the claim if it hadn't withdrawn indemnity, in line with the terms and conditions of the policy. As G has paid these costs and therefore been without money it should have had, Amtrust should add interest to this amount at a rate of 8% simple per year from the date Amtrust reimbursed G for its costs on the part of the claim they did pay to the date they make payment.*

#### *Costs*

*The terms and conditions of G's policy say that Amtrust won't pay interim costs and if costs can't be recovered from the opponent then an invoice should be submitted to Amtrust after the conclusion of the case. I realise that given the nature of the hearing it's unusual for a policyholder to be able to recover costs from the opponent, but I think it was reasonable for Amtrust to rely on this term.*

*Amtrust appointed a firm of cost assessors in September 2019. I can see from an email that G said its files were primarily held electronically but there were also a few boxes of paper files. There was initially a dispute about who should pay for the costs involved in couriering the files to the cost assessor, but I'm pleased to see that Amtrust ultimately agreed to pay for these.*

*I think G made it clear that there were paper files that needed to be reviewed. There appears to have been a misunderstanding as the cost assessor said they didn't need to review the paper files as they suspected they would be mostly documents relevant to disclosure which didn't need to be viewed at that stage.*

*Amtrust made an initial offer on costs in January 2020. Discussions between the parties continued over a number of months and G highlighted that the assessor hadn't reviewed the paper files. I can see that Amtrust offered for the cost assessor to review their findings in light of this.*

*It's not for me to make a finding on the costs arrived at by the costs assessor and I think Amtrust did what it needed to do in appointing a cost assessor and in offering to correct any mistake by reviewing the files.*

*I appreciate G thinks it should have been able to appoint its own cost assessors at Amtrust's expense, but this isn't something that's covered by the policy. In any event, G has had its own legal advice in relation to the negotiations over costs. I'm not going to make any award for this as I think Amtrust did what it needed to do in appointing a cost assessor and offering to review the amounts.*

*I've also noted G's comments that it found Amtrust's approach to negotiating costs to be obstructive, unfair, hostile and at time misleading however I'm not upholding its complaint in relation to that. While there were disagreements over the costs I think Amtrust did their best to resolve things fairly.*

Amtrust didn't accept my provisional decision. They said G had benefitted from their error and to conclude that G wouldn't have gone ahead with the appeal if it hadn't been covered is inconsistent with its duty to act as though uninsured. Amtrust thought G would most likely have gone ahead with the appeal as its reputation was at stake.

G accepted my provisional decision in part but also disagreed with a number of points. It provided a detailed response. In summary, it said:

- The decision hadn't dealt with the following complaint points:
  1. Whether the policy was fit for purpose as it contained a clause allowing Amtrust to cancel the policy if G went into administration.
  2. That the claims handler allocated in December 2018 wasn't suitable due to their lack of knowledge of the QCQ appeals.
  3. The policy is unsuitable as G would never have been able to recover costs from the other party.

- The decision didn't engage with G's complaint that Amtrust was entitled to refuse to reimburse a proportion of the its costs for the time it was on cover.
- My decision would put G in the position of having to enter further negotiation with Amtrust over the costs to be repaid. G said it had incurred significant costs in responding to Amtrust.
- Section 12 of G's policy says that it will cover all costs and expenses in connection with any appeal.
- My decision should require Amtrust to reimburse G's actual costs both up to the point it withdrew cover and then to the conclusion of the case.
- It remained unhappy with other parts of the policy which were covered by a different insurer.

G clarified that Amtrust had paid towards its costs until 9 August but remained unhappy about the amount paid.

### **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.

Having considered the points both G and Amtrust have made, I'm not going to depart from my provisional decision. As in the provisional decision I'm not going to comment on every point G has made and in this decision will focus on what I think are the central issues. This reflects the informal nature of our service and my role.

#### *What is being considered*

G has referred to its complaint about another insurer. In this decision I can only make a finding on anything Amtrust might, or might not, have done wrong. Therefore, any complaint about another insurer will be dealt with separately.

G has also referred to Section 12 of G's policy. However, that is separate cover which isn't insured by Amtrust. Therefore, I'm not going to comment on it further in this decision.

#### *Amtrust's claims handler*

I understand G is unhappy about the knowledge and experience of Amtrust's claims handler. However, I'm satisfied that my final decision fairly compensates G for any error made by the claims handler.

#### *Suitability of G's policy*

With regard to G's policy containing terms which it finds unfair, I would draw G's attention to my findings that "*I don't find this term unfair or unusual*" and "*I realise that given the nature of the hearing it's unusual for a policyholder to be able to recover costs from the opponent, but I think it was reasonable for Amtrust to rely on this term.*"

If G thinks the policy is unsuitable and is unhappy about how the policy was sold it would need to complain about the sale of the policy separately.

#### *Costs*

I understand G thinks that my provisional decision doesn't engage with G's complaint that Amtrust's initial costs offer was too low. However, I'm not determining the costs payable and instead have considered what Amtrust have done in assessing the costs. I'm satisfied that Amtrust did what I'd expect it to do by appointing a costs assessor to look into them and reviewing the costs when G raised concerns.

#### *Amtrust's response to my provisional decision*

I understand Amtrust thinks G would have gone ahead with the claim if Amtrust hadn't made an error in offering indemnity as its reputation was at stake.

As Amtrust didn't notice their error sooner it's impossible to know for sure what G would have done in April 2019. However, on balance I'm persuaded by what G has said given the cost involved in pursuing the appeal without indemnity. I don't think it's fair and reasonable for Amtrust to say that in deciding not to pursue the appeal G would have been acting in conflict with its duty to act as though uninsured as I don't think it would be reasonable to expect G to fund its own appeal when it's in administration even if it did have reasonable prospects of success.

#### **Putting things right**

I've noted G's point that it would like me to award its full costs and to provide a settlement figure. However, I remain satisfied that the fair and reasonable outcome to this particular complaint is for Amtrust to reimburse G for any additional costs they would have been responsible for if they hadn't withdrawn indemnity, plus interest on that amount at a rate of 8% simple per year from the date Amtrust paid the costs on the part of the claim they did pay until the date they make payment.

#### **My final decision**

For the reasons set out above and in my provisional decision, my final decision is that I uphold this complaint and require Amtrust Europe Limited to reimburse G for any additional costs they would have been responsible for if they hadn't withdrawn indemnity, plus interest on that amount at a rate of 8% simple per year from the date Amtrust paid the costs on the part of the claim they did pay until the date they make payment.

Under the rules of the Financial Ombudsman Service, I'm required to ask G to accept or reject my decision before 22 June 2022.

Sarann Taylor  
**Ombudsman**