

## **The complaint**

Mrs A is unhappy with what Amtrust Europe Limited did after she made a claim on her legal expenses insurance policy.

## **What happened**

Mrs A has legal expenses insurance with Amtrust as part of her home insurance. In December 2019 she contacted it to make a professional negligence claim. She said a barrister who she engaged to object to planning permission being granted for a development at a neighbouring property didn't highlight key planning reasons for refusal. She thought if he had done permission would have been refused. Amtrust accepted there was cover under the policy and a number of legal opinions have been sought as to whether the claim would have reasonable prospects of success as required by the policy.

The most recent of those was obtained in March 2022. That didn't advise on the professional negligence claim itself but on whether there would have been grounds for a successful judicial review (JR) of the decision to grant permission, what its prospects of success would have been and whether the local authority would have made a different decision if the JR had been successful.

Counsel concluded there were grounds for a successful JR (in particular because the local authority hadn't taken into account a relevant planning policy). And it was likely a judge would have quashed the planning consent. But she thought it only 50/50 as to whether the local authority would have reached a different decision if it asked to consider the matter again.

Amtrust said for a successful professional negligence claim there needed to be a loss to Mrs A. As counsel hadn't concluded the local authority would have reached a different decision that wasn't the case here. It didn't agree to fund her claim.

Mrs A said counsel had only considered whether the local authority would have reached a different decision if the grant of planning permission had been overturned after a JR. She hadn't looked at what would have happened if her barrister had correctly drawn attention to the relevant issues in his initial letter to the planning committee, when sending the subsequent letter before claim or prior to any JR application.

Our investigator thought Amtrust could fairly rely on the most recent counsel's opinion in relation to the prospects of success of a professional negligence claim as it related to the JR. But he thought counsel should also have commented on the other loss of chance points Mrs A highlighted. So Amtrust should now ask counsel to do so.

Amtrust didn't agree. It said the instructions to counsel had been drafted by Mrs A and if she now wanted an opinion on the other points she'd highlighted it would be reasonable of her to pay for that. Mrs A said she'd be happy to pay for the barrister to review matters herself but as the barrister was instructed by Amtrust she was unable to arrange this herself and would need Amtrust to do so.

Our investigator asked Amtrust if it would agree to this but it said doing so would require it to assign resources to a claim that had been fairly declined which it wasn't prepared to do. 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.

I appreciate this claim has a long history and a number of different issues have arisen during the course of it. However, the complaint I'm considering relates to what Amtrust did after the most recent counsel's opinion was obtained on Mrs A's claim. And I've looked first at the terms and conditions of Mrs A's policy.

In common with other legal expenses insurance policies it says it's a condition of cover that a claim *"always has reasonable prospects of success"*. The relevant definition in the policy is *"a greater than 50% chance of the insured successfully pursuing or defending the claim and, if the insured is seeking damages or compensation, a greater than 50% chance of enforcing any judgment that might be obtained."*

In order to establish a successful claim for professional negligence claim it's not enough to demonstrate there has been negligence by the professional but that that negligence has caused a loss to the claimant. In this case I think it's reasonable to say any loss would potentially depend on whether the planning committee would have reached a different decision but for any negligence. So I can understand why Amtrust agreed to ask counsel to assess that rather than the professional negligence claim itself; if there's no loss to Mrs A then the professional negligence claim wouldn't have reasonable prospects of success.

I appreciate there have been a number of counsel's opinions on this matter with differing views on that. But the most recent opinion does conclude the officer's report on the planning application didn't draw the committee's attention to a key planning policy. And a JR on those grounds would likely have been successful. But counsel didn't conclude the committee were likely to have reached a different decision if the application had been remitted back to them for redetermination.

I don't think it's in dispute counsel considered that on the basis of a successful JR application and hasn't looked at what would have happened if relevant considerations had been drawn to the committee's attention at earlier stages of the planning process. And I understand instructions for counsel were proposed by Mrs A and then agreed by Amtrust. I don't think Amtrust did anything wrong in then relying on that opinion to say reasonable prospects of success for Mrs A's claim hadn't been established.

However, Mrs A then raised concerns about counsel's opinion and in particular that she thought it likely the planning committee would have reached a different decision if objections had been raised by her barrister at earlier stages of the planning process. She wanted counsel to consider these points.

In response to our investigator's view Amtrust initially objected to asking counsel to reconsider matters because of the cost of further advice. However, Mrs A has made clear she'd be prepared to pay the costs herself. So I don't see Amtrust can rely on that argument. However, I have considered whether, on the face of it, there are grounds to think counsel might have advised differently if asked to comment on this issue; there would be little point in asking Amtrust to arrange for a further opinion if it was obvious the same outcome would be reached.

But I don't think that is the case. In her opinion counsel referenced a policy in the draft local plan which she believed would have supported the officer's recommendation to grant permission for the application. She noted that while the plan was in draft, consultation on it would have been in progress when the redetermination of the application was likely to have taken place. And that was one of the factors she considered when concluding it was only 50/50 as to whether the committee would have reached a different decision after a successful JR.

However, the consultation on that draft local plan would still have been two years in the future at the time the original decision to grant planning permission was taken. So it's less clear this is something the committee could reasonably have had regard to at that time. I appreciate counsel also referenced other considerations that might have led committee members to support or refuse the application. But I don't think it's obvious her conclusions about what would have happened following a successful JR would necessarily apply to a correct consideration of the application at earlier stages of the process.

I appreciate this matter been ongoing for some years and I also accept Amtrust will need to assign some claim handling resource in order for further instructions to be provided to the barrister. But I don't think it's unreasonable to expect it to do that in the circumstances of this case. For the reasons I've explained I think there is at least a possibility counsel might reach different conclusions on the outcome the committee would have reached if its attention had been drawn to the relevant planning considerations at an earlier stage in the process.

Given that, and taking into account that Mrs A has agreed to pay for this further advice, I do think it's fair Amtrust should instruct counsel to comment on these points. That will bring finality to this issue and provide assurance to Mrs A that all aspects of her claim have been properly considered.

### **Putting things right**

Ms A has agreed to pay for the cost of further advice from counsel. So on that basis Amtrust will need to instruct counsel to comment on whether the decision of the planning committee is likely to have been different if the application had been correctly considered at the time of the initial decision to grant permission (August 2016) or whether the local authority is likely to have acted differently if the relevant issues had been highlighted in a pre-action protocol letter in December 2017.

I can see Mrs A has also said information is available on the breakdown of voting numbers by the committee (counsel's opinion said she didn't have information on that). So that's evidence that Mrs A will be able to submit as part of this process.

If counsel does conclude that a different decision would likely have been reached Amtrust will need to progress the claim in line with the policy terms (which I understand is likely to involve getting further legal advice on whether the professional negligence claim itself would have reasonable prospects of success).

### **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 Mrs A to accept or reject my decision before 6 January 2023.

James Park  
**Ombudsman**