

## The complaint

Mrs M is unhappy that when she made a legal expense claim for both defence and counterclaim assistance for a property dispute, she was having. Amtrust Europe Limited didn't provide any advice on the counterclaim aspect. She says this caused her to lose out financially and she'd like compensation for legal fees she paid.

Any reference to Amtrust includes its agents.

## What happened

Mrs M received a writ regarding an encroachment to a neighbour's land in July 2020. Mrs M contacted Amtrust about the writ and about the fact that her neighbour was encroaching on a common path.

Amtrust confirmed she was covered and referred the claim to a firm of solicitors I'll call 'S'. Mrs M instructed a surveyor who was to look at both the claim and counterclaim. S initially reported to Amtrust that Mrs M's claim and counterclaim had a greater than 50% prospects of success but said this was dependent on her surveyor's report. When it commented on the proportionality of any action it said that it had no information to assess the value of the land in dispute and the surveyor would need to do this. It did, however, comment that fees and expenses for the matter could exceed £25,000. After speaking to the surveyor S reported to Amtrust that the action didn't enjoy prospects of success and raised issues regarding proportionality. Amtrust therefore withdrew its support.

Mrs M went on to instruct a solicitor – at her own cost of around £6,000 – to defend the writ and to make the counterclaim. The parties were able to submit a joint motion and neither party was required to pay expenses to the other.

Soon after the court proceedings had come to an end Mrs M raised a complaint with Amtrust that the counterclaim hadn't been considered and Amtrust contacted S. S provided Amtrust with a copy of an email it sent to Mrs M. In it S said:

*I reviewed [the surveyor's] report last night and spoke to him today.*

*Shortly put it doesn't enable me to be able to report to [Amtrust] that your defence enjoys reasonable prospects. His report can't indeed be released to your neighbour as it is overall not supportive. It's also the case that the report makes clear that the area of land in dispute is relatively minimal and [Amtrust] won't fund if the claim is not proportionate.*

*I have to so advise [Amtrust] and anticipate they will withdraw funding.*

When asked about the counterclaim of the neighbour encroaching on Mrs M's path. S responded that "A counterclaim would not have been appropriate (or possible) where, as here, there was no reasonable prospects of successfully defending the action". Amtrust informed Mrs M that if she still felt the counterclaim was justified, she'd need to have a surveyor's report of the issue of the alleged encroachment and that could then be considered.

Mrs M wasn't satisfied with Amtrust's response and brought a complaint to this service. She said in all the correspondence S provided he only ever referred to the defence of the writ. He never once commented on the counterclaim. She says before he sent his email advising of the withdrawal for funding, he called her to explain this would be the case and would send an email confirming so. She says she specifically asked him about the counterclaim, and he advised her he was only instructed to investigate the pressing issue of the defence of the writ. She further says Amtrust didn't review the surveyor's report until after her complaint. She says that Amtrust was incorrect to say there was no mention of the encroachment in the surveyor's report (which was later rectified) because although it wasn't mentioned in the summary report it was shown on the plans.

She says she was given poor advice because she should have been told that she could pursue the counterclaim as a separate claim. A claim she believes she would have been covered for.

The investigator didn't recommend the complaint be upheld. She thought that both the defence and counterclaim elements of Mrs M's claim were considered. And that it was fair for Amtrust to decline her claim based on the evidence presented to it by S, and not pursue the counterclaim.

Mrs M didn't agree that her counterclaim was considered. She said if it was considered then it would have been included in communication between her and S and she didn't receive any advice on the counterclaim. She says S only considered the chance of her defence. As her counterclaim concerned her neighbour having encroached on a common path, she says there is no defence to him having done this so her chance of success would have to be more than 51%. She says S told her in a phone call that they had only been advised to look at the success of the defence of the writ as the case was up against time. She says she should have been advised to raise the counterclaim separately

The investigator responded to say that if Mrs M had evidence that the counterclaim would have been successful, she should have supplied this to Amtrust.

### **My provisional decision**

I issued a provisional decision in it I said:

*I want to make it clear at the outset that this is a decision about Amtrust and its agents it is not a decision about S. We do not have jurisdiction to look at a complaint about S.*

*In common with many legal expenses policies, Mrs M's policy provided that it may decline to support a claim if it formed the view: that you do not have a more than 50% chance of winning the case and achieving a positive outcome. This is known as a prospects of success assessment. Part of the consideration of a positive outcome involves a consideration of proportionality. If it is going to cost more to make a claim than the claim is worth then the claim wouldn't be considered to be proportional and indeed there is a specific clause in the insurance policy which excludes cover when: A reasonable estimate of your advisers' costs of acting for you is more than the amount in dispute.*

*Insurers are not experts in law and so we think it is reasonable for them to rely on a properly qualified lawyer's well-reasoned prospects of success assessment. In this case the lawyer making the assessment was a partner in his firm and so I have no reason to doubt he was properly qualified.*

*When S was instructed, the letter of instruction said it included a copy of the claim form. The claim form says that the claim was for: Neighbour claimed we encroached on his property which we disputed. Upon looking into the property details we realised he had encroached on the common path. There was no resolution, he has issued us with a writ, we would like to defend and counterclaim regarding his encroachment on the common path. When S reported back to Amtrust in what is called a Stage 2 Screening it summarised the issues as: Clients sued by neighbour over boundary dispute; clients want to counterclaim. I therefore think Amtrust made S aware that the claim included a counterclaim. I appreciate that Mrs M says that S told her he was only instructed regarding the claim, but the written evidence doesn't support that his instructions were so limited.*

*After speaking to the surveyor, S emailed Amtrust to say:  
Shortly put, the report is not supportive and so we cannot say that the client's defence to the action raised enjoys reasonable prospects of success. Nor is the area of land such that the dispute is proportionate (and it maybe that cover is anyway doubtful).*

*We have so advised the client today and said that if she intends to defend the action she will have to do so privately given our recommendations to you and anticipating that you will not agree to fund further.*

*The advice from the solicitor is indeed very shortly put. But I do think it is clear that the defence to the claim didn't enjoy reasonable prospects of success. I don't think what is set out in the email was however sufficient for Amtrust to say it had received a well-reasoned assessment of the claim regarding the neighbour encroaching on to the common path. I think the words: Nor is the area of land such that the dispute is proportionate is the solicitor saying that the common path claim isn't proportionate. But I think it would be reasonable to expect Amtrust to have followed this up and obtained clarification about what S was thinking.*

*Mrs M didn't immediately complain to Amtrust. She says this is because she was tied up in dealing with the writ.*

*When Mrs M did complain to Amtrust it did ask S about the counterclaim. And S said: A counterclaim would not have been appropriate (or possible) where, as here, there was no reasonable prospects of successfully defending the action. Your insured can of course pursue the 'counterclaim' as a separate claim and may now wish to do so, but I obviously do not know what happened to the third party's court action and regard would have to be had to that, but I would think if this is what she now wants to consider it would be appropriate in the circumstances for the client to instruct a surveyor's report which deals only with the issue of alleged third party encroachment on the common ground (and extent of same), to see if that claim report is supportive and therefore there is a claim which both enjoys prospects and is proportionate. I think this makes it clear that S didn't consider whether Mrs M could bring a separate claim for the encroachment on to the path at the time he told Amtrust the claim didn't have prospects of success.*

*I think Amtrust accepted a prospects of success assessment that wasn't complete as it didn't set out in a properly written, well-reasoned way what the prospects of success were for the claim regarding encroachment on to the common path.*

*It is unfortunate that Mrs M didn't raise her belief that S wasn't instructed regarding the encroachment on the common path with Amtrust immediately. Doing so would have meant S could have been asked to give his view on the prospects of success for the encroachment on the common path. But I accept that Mrs M was busy dealing with the writ.*

*Mrs M would like me to make an award of £3,000 being approximately half the cost of her defence and counterclaim. I can understand why Mrs M thinks that would be a fair*

*resolution. But I can't make such an award. This is for two reasons. The first is she has told this service that the solicitor she instructed to act on the writ after Amtrust removed cover told her that the cost of pursuing the encroachment on to the common path would be around £2,000. The second is that because as things currently stand, I am not yet satisfied that her claim would have been covered. To be satisfied that her claim would be covered I need Amtrust to instruct a barrister to consider whether, based on the information available at the time of the claim (or could have been obtained at that time,) the claim for the encroachment onto the common path had a reasonable prospect of success and was proportionate and therefore fell within cover under the policy.*

*If the barrister does find there was prospects of success. I think it would be reasonable for Amtrust to pay Mrs M £2,000 towards her legal fees plus interest from the date she paid those fees at 8% fee simple.*

*I also think that Amtrust has caused Mrs M unnecessary distress and inconvenience at was already an upsetting time. I think it would be fair for it to pay her £200 to compensate her for the distress and inconvenience.*

### **Responses to my provisional decision**

Mrs M had nothing further to add.

Amtrust accepted my provisional decision and provided me with a copy of an opinion it has obtained a barrister.

### **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 both parties have accepted my provisional decision I see no reason to depart from it.

It is not for me to review or comment on the barrister's opinion as that was not part of Mrs M's complaint to this service. I will, however, remind both parties that I said in my provisional decision that: *Insurers are not experts in law and so we think it is reasonable for them to rely on a properly qualified lawyer's well-reasoned prospects of success assessment.* I will also remind both parties I said in my provisional decision the opinion *needs to be based on the information available at the time of the claim (or could have been obtained at that time).*

### **Putting things right**

To put things right I will direct that Amtrust:

- instructs a barrister to carry out a prospects of success assessment for the claim for an encroachment on to the common path;
- pays Mrs M £2,000 towards her legal fees (plus 8% interest a year simple from the date of payment of those fees to the date she receives the £2,000) if that prospects of success assessment finds that the encroachment on to the common path should have been covered under the policy and cover shouldn't therefore have been withdrawn; and
- pays Mrs M £200 for the distress and inconvenience caused to her.

## **My final decision**

I uphold this complaint and direct that Amtrust Europe Limited:

- instructs a barrister to carry out a prospects of success assessment for the claim for an encroachment on to the common path;
- pays Mrs M £2,000 towards her legal fees (plus 8% interest a year simple from the date of payment of those fees to the date she receives the £2,000) if that prospects of success assessment finds that the encroachment on to the common path should have been covered under the policy and cover shouldn't therefore have been withdrawn; and
- pays Mrs M £200 for the distress and inconvenience caused to her.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 15 December 2022.

Nicola Wood  
**Ombudsman**