

## **The complaint**

Mr D and Mr S complain that Amtrust Europe Limited has unfairly refused to reimburse the costs of a barrister's legal assessment under Mr N's legal expenses insurance policy.

Where I refer to Amtrust, this includes the actions of its agents and claims handlers for which it accepts responsibility.

## **What happened**

Mr D and Mr S both made a claim under their policy for the legal costs to pursue an employment claim.

Amtrust obtained a legal assessment from its panel solicitors, which concluded that the claims didn't enjoy reasonable prospects of success. As this is a requirement for cover under the policy, Amtrust declined the claims. It told Mr D and Mr S that they were entitled to seek a legal challenge in the form of a solicitor's opinion, at their own cost, and if supportive Amtrust would obtain a third and final opinion from a barrister to determine whether the claims could be accepted.

As the Employment Tribunal deadlines were fast approaching, Mr D and Mr S decided to obtain a legal challenge directly from a barrister to speed up the process. This was supportive, so Amtrust agreed to accept the claims and funding was subsequently put in place.

Mr D and Mr S asked Amtrust to reimburse the barrister's fees. They say the panel solicitor's advice was wrong. And that had they obtained a legal challenge from a solicitor, Amtrust would've had to incur the costs of a barrister rather than them. But Amtrust say the costs were incurred without its authorisation, so it said its not obligated to pay them.

Mr D and Mr S raised a complaint. They want Amtrust to meet these costs but without deducting it from the limit of indemnity. They were also unhappy that Amtrust had sent an email to Mr S which was meant for Mr D.

Amtrust didn't uphold the complaint. It said it had acted in line with the policy terms and conditions. And that, as Mr D and Mr S' claims are linked, there was no detriment to the email being sent to the wrong party. It did, however, offer to contribute £600 each towards the barrister's fees as a gesture of goodwill. Mr D and Mr S didn't accept the offer.

On reconsideration, Amtrust reduced its offer to £200 each. It said Mr D and Mr S had provided more information to the barrister than they had to Amtrust, meaning that the panel solicitors hadn't benefited from all available information.

Mr D and Mr S accepted payment of this offer but they felt it was unfair. They say the reason the barrister had more information was because they asked for it, whereas the panel solicitors didn't request anything but instead concluded there weren't reasonable prospects of success due to lack of evidence. They say, as they're not legal experts, they don't know what information is needed to assess the merits of their claims.

The complaint was brought to our service, but our Investigator didn't uphold it. She considered the offer from Amtrust to be reasonable in the circumstances. Mr D and Mr S didn't agree, so the complaint was passed to me to decide, and I issued the following provisional decision.

### **My provisional decision**

The terms and conditions of the legal expenses insurance policy say there is no cover for *“advisers’ costs or any other costs and expenses incurred which have not been agreed in advance or are above those for which [Amtrust] has given [its] prior written approval”*.

At the time Mr D and Mr S incurred the costs of the barrister's advice, their claims had been declined on the basis of a negative prospects assessment from Amtrust's panel solicitors. So I don't think there was any ambiguity there that Mr D and Mr S' legal costs at that time weren't agreed or approved under the policy. I can see that Amtrust had given Mr D and Mr S their rights to obtain a legal challenge and it was clear this would be at their own cost. I don't think this is in dispute.

Mr D and Mr S' point is that they didn't have time to go through the process of getting three legal opinions when their limitation date was imminent, so they obtained the barrister's opinion which would've been the responsibility of Amtrust had they followed the process. So they've asked whether Amtrust would meet these costs. I don't think this request is unreasonable.

For clarity, I don't agree with Mr D and Mr S' argument that the panel solicitor's assessment was wrong. Whilst their barrister agreed there were reasonable prospects, this doesn't mean a contrary opinion is incorrect – they are only opinions after all and not a guarantee of how the claims will conclude.

Amtrust initially offered £600 each out of the £1,900 incurred on each claim. This was based on what it would've paid a barrister had it instructed one and the barrister's invoice which showed the cost of the written opinion was £600 and the remainder of the costs were for oral advice – which Amtrust wasn't prepared to pay. I think this offer was fair in the circumstances as Amtrust would've only obtained a written legal assessment to determine cover.

But, when Mr D and Mr S asked if the offer could be improved upon, Amtrust reduced it to £200 each. It said the barrister had access to more information than its panel firm. But I'm not persuaded that's fair. I say this because there was nothing to stop the panel solicitor requesting more information from Mr D and Mr S (like the barrister did) – they didn't have to conclude there were no prospects due to lack of evidence without checking whether there was more evidence available. So I'm not persuaded it was fair to reduce the offer after it had been made.

Amtrust say it didn't have to offer anything and I agree, the policy doesn't obligate Amtrust to reimburse Mr D and Mr S. But I'm not bound by the policy terms and conditions. I've also considered what's fair and reasonable in the circumstances of this complaint. And I think, based on Mr D and Mr S' situation and the likeliness that Amtrust would've needed to pay for a barrister's opinion if Mr D and Mr S hadn't, it's reasonable for Amtrust to meet some of the costs here.

For this reason, I'm inclined to direct Amtrust to pay £600 per claim minus the contribution its already made. However, Mr D and Mr S should be aware that this will be deducted from their limits of indemnity as all claims costs are. As I've said above, I don't agree the panel firm's

advice was wrong solely because it differed from the barristers, and I haven't seen anything to persuade me that Amtrust weren't able to rely on it when declining the claim initially.

And finally, Mr D and Mr S also complain that Amtrust sent an email to Mr S which was meant for Mr D. I can understand why they're unhappy about this as it follows a previous complaint of a similar nature. But in this instance, I don't think there has been a detrimental impact here, so I don't think Amtrust need do anything to put things right in this respect.

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

Mr D and Mr S has asked me to consider awarding the following costs:

- Reimbursement of the legal costs incurred after their claims were submitted to Amtrust to protect their position and satisfy the Tribunal deadlines including the costs of drafting the particulars of claim.
- The barrister's fees for the oral advice which included all the readings costs used for the Tribunal representation too.

Amtrust accepted my provisional 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.

As I've explained in my provisional decision, I don't agree with Mr D and Mr S' argument that the panel solicitor's assessment on the prospects of success of their claims was incorrect. And I haven't seen anything to persuade me that Amtrust weren't able to rely on it when declining the claim initially.

Because of this, until a supportive prospects assessment was received, Amtrust weren't in a position to accept the claims under the policy terms and there was no cover for any legal costs being incurred. I appreciate Mr D and Mr S would've needed to protect their position due to the limitation date. But as their claims hadn't been accepted under the policy at that time and the only prospects assessment received was unsupportive, these costs aren't covered by the policy.

So I can't fairly say that Amtrust should cover any legal fees incurred during that time until it was able to accept the claims.

I do think Amtrust should meet the costs of the barrister's prospects assessment on a fair and reasonable basis for the reasons I set out in my provisional decision. But this doesn't extend to the legal costs of pursuing the claims (such as oral advice or reading costs for the Tribunal) as there wasn't cover under the policy to pursue the claims at that time.

### **My final decision**

For the reasons I've explained, I direct Amtrust Europe Limited to pay Mr D and Mr S a further contribution towards the barrister's fees of £400 each bringing the total paid to £600 each in line with its original offer. Amtrust are entitled to deduct this from the limit of indemnity available for each claim.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D, Mr N and Mr S to accept or reject my decision before 28 March 2023.

Sheryl Sibley  
**Ombudsman**