DRN-4256139

The complaint

Mr D complains that Financial & Legal Insurance Company Ltd ("F&L") declined his legal expenses insurance claim and voided his policy after it discovered that evidence from the other party in the dispute contradicted the information Mr D had provided when he took out the policy.

What happened

Mr D was involved in litigation over the purchase of timeshare products that he says were sold to him as an investment in 2013 and 2015. When he tried to sell the timeshare, he was told this wasn't possible. And the timeshare organisation has told him it wasn't sold as an investment.

Mr D wanted to take the organisation to court to recover the money he'd paid for the timeshare. He entered into a conditional fee ("no win no fee") agreement with solicitors and took out After the Event (ATE) insurance through the solicitors to cover disbursements and the risk of having to pay the defendant's costs if he lost.

When evidence was received from the defendant it included email correspondence that contradicted what Mr D had said about what happened. F&L said Mr D had failed to give accurate information when he took out the policy, so it declined funding for his claim and voided the policy.

In response, Mr D's solicitors said his recollection of events may have been inaccurate but a long time had passed, he'd been consistent with what he recalled and it's not unusual for someone's recollection of events to have faded over the years.

F&L maintained its position so Mr D referred his complaint to this service. Our investigator said:

- He didn't think Mr D had purposefully omitted information – he had simply forgotten exactly what had happened. He didn't think this was a misrepresentation that allowed F&L to void the policy.
- But once the new information was known, the chances of success fell below 50% so it was fair for F&L to say it wouldn't provide any further cover for the claim from that point onwards.

The investigator asked F&L to provide a letter for Mr D saying his policy was not void.

Initially, the investigator said Mr D hadn't incurred any loss, so F&L didn't need to make any payment. But after considering further comments from Mr D's solicitor, he thought Mr D might have to pay disbursements together with costs claimed by the other side. He recommended that F&L pay any disbursements and any defendant's costs Mr D was liable for, up to the point when cover ended.

F&L didn't accept the investigator's findings and requested an ombudsman's decision. It provided detailed comments in support. I won't set them out in full but the key points included:

- This isn't a case of Mr D misremembering things; he is simply being untruthful about what happened. He had detailed correspondence with the timeshare organisation leading up to him surrendering one timeshare and then taking out another one, but didn't mention any of this. It's inconceivable that he wouldn't remember such extensive correspondence.
- Mr D and his wife signed an agreement in which they waived the right to pursue any further claims against the timeshare organisation. If it had been aware they'd agreed to surrender their membership and make no further claims, it would never have issued the policy.
- When Mr D was presented with the correspondence, he didn't say he couldn't recall seeing it before or signing an agreement, but changed his story about what had happened.
- This is not a case where prospects of success had been 65% but fell to below 50% on discovery of new information; if Mr D had disclosed the correspondence at the time, there would never have been legal advice that he had prospects of success.
- It was appropriate to void the policy in circumstances where Mr D had failed to disclose the information and failed to present the risk fairly.

I issued a provisional decision saying I intended to uphold the complaint but my reasons for doing so were different from the investigator's. I set out my reasons as follows:

F&L says there was a misrepresentation by Mr D when he took out the policy; his case never had prospects of success and the policy should never have been issued. F&L says that entitles it to treat the policy as void. It has relied on a term in the policy that says

6.1 For the avoidance of doubt, if the Appointed Representative and/or the Insured is found to have acted dishonestly or adverse findings as to credibility and honesty are made by a court, The Insurer reserves the right to void the Policy ab initio.

6.2 The Insurer shall be entitled to void the Policy ab initio where there has been any non-disclosure or misrepresentation of material facts or untrue statements made by the Insured prior to and after Inception or at any time during the course of the Proceedings.

I've taken this into account but I've also taken account of the relevant law, which in this case is the Consumer Insurance (Disclosure and Representations) Act 2012 ("CIDRA") and industry rules that say an insurer must deal with a claim promptly and fairly and must not unreasonably reject a claim.

There hasn't been any finding that Mr D acted dishonestly or any adverse findings as to his credibility and honesty by a court. The policy term would allow F&L to void that policy if there has been a non-disclosure or misrepresentation of material facts or Mr D has made untrue statements. But CIDRA sets out relevant considerations to be taken into account when considering this.

F&L has referred to Mr D failing to present the risk fairly. In commercial insurance contracts the policyholder has a duty to make a fair presentation of this risk. But this was a consumer contract where CIDRA applies.

A consumer has a duty to take reasonable care not to make a misrepresentation. One of the things to consider when deciding whether they failed to do so is how clear and specific the insurer's questions were.

It's for the insurer to prove that the information was incorrect or incomplete. So F&L would need to provide evidence of, amongst other things:

- *what question was asked;*
- *what answer was given and;*
- *the answer given was incorrect*

Insurers generally obtain the information they need by asking a customer to complete an application or proposal form, answering the questions set out by the insurer. The policy document refers to "The Insured having made a proposal and signed a declaration". I asked for details of this and F&L explained there wasn't a proposal form – what this referred to was a statement signed by Mr D and submitted together with legal advice on his case. Mr D wasn't asked to complete a proposal form and F&L didn't communicate with him directly. I understand the policy was issued by the solicitors on its behalf.

F&L hasn't been able to provide evidence that Mr D was asked any question. So I can't be satisfied he was asked a question or, if he was, how clear and specific that question was or whether, for example, he was instructed to check any details he wasn't sure of or to check and provide copies of any correspondence or other documents relating to the timeshare.

And I can't say what answer was given to the question if no question was asked. It seems the policy was issued simply on the basis of a statement from Mr D and a legal opinion that his case was likely to be successful. Mr D's statement was made on the basis of his recollection of events at the time, which was some years after the sale of the timeshare.

In these circumstances I don't think F&L has shown a failure to take reasonable care by Mr D and so it hasn't demonstrated there was a qualifying misrepresentation by him. So it wasn't fair to void the policy.

The policy terms require a claim to have reasonable prospects of success. This is usually the case with legal expenses insurance; it wouldn't be reasonable to expect an insurer to provide cover if the policyholder is unlikely to win their case. Once the further evidence came to light, the legal advice was that Mr D wasn't likely to be successful. So it was reasonable for F&L to stop providing cover from that point. But it wasn't reasonable to reject the claim entirely and void the policy.

F&L said it was voiding the policy on 12 November 2021. As I think it should have withdrawn cover at that point rather than void the policy, it should provide cover for costs incurred up to that date.

In addition, to prevent another insurer refusing to offer Mr D insurance on the basis this policy was voided, F&L should provide a letter for him confirming his policy wasn't void.

Putting things right

The policy covered Mr D for disbursements and for paying the other side's costs if he was unsuccessful. So I agree F&L should:

- *cover any disbursements that were incurred to 12 November 2021; and*
- *cover any costs being claimed from him by the defendant for the period up to 12 November 2021; and*
- *provide a letter for Mr D saying his policy was not void.*

Replies to the provisional decision

Mr D's solicitors have replied to confirm they accept the provisional decision. The only

additional comments they make are that the costs still have to be negotiated, and it may save F&L time if it deals with the costs negotiations directly.

F&L does not accept the findings in the provisional decision. It has provided a number of further comments. I will summarise the key points as follows:

- Mr D made a clear and misleading representation to the solicitors and insurers by saying he and his wife had threatened to surrender their timeshare with the timeshare organisation when in fact they had already surrendered it.
- This is caught by "..*any non-disclosure or misrepresentation of material facts…"* in condition 6.2 of the policy.
- It was the solicitors' responsibility – not F&L's – to put questions to Mr D. It presumes the solicitors asked for copies of correspondence between Mr and Mrs D and the timeshare organisation. If they did request copies and Mr and Mrs D failed to provide a copy of the surrender agreement, the ombudsman should be satisfied Mr D failed to reply to the questions properly.
- F&L delegated the decision to provide the insurance policy to its agents, who in turn delegated it to the solicitors. And the solicitors agreed to assess and vet prospective claims.
- As these matters were dealt with by the solicitors, the ombudsman should have asked them what questions were asked of Mr D.

Before proceeding with the decision I responded to F&L's comments clarifying that, while the policy may have been issued by the solicitors they were acting on F&L's behalf. So it was responsible for the solicitors' actions and it's for F&L to demonstrate what questions were asked and show there was a misrepresentation as set out in CIDRA.

F&L maintains there was a misrepresentation and says:

- The misrepresentation was so fundamental it cannot see how it's not able to void the policy.
- It can't see how anyone could have predicted that Mr D had signed the surrender agreement and signed away his legal rights to claim. So it's not clear how anyone could have put this question to Mr D.
- The request for the questions put to Mr D which he replied to in a misleading way needs to be answered by the solicitors; it doesn't have access to their file and can't provide this information.

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.

I appreciate that F&L is relying on a clause in the policy terms that allows it to void the policy if Mr D has made a misrepresentation or failed to disclose material facts. The policy terms are the starting point when considering the relationship between Mr D and the insurer. But I also have to take account of relevant law.

As I explained in the provisional decision, the relevant law in this case is CIDRA. And that sets out clearly what matters to take into account when deciding whether there has been a qualifying misrepresentation. The starting point for that is to consider what questions the insurer asked and how clear those questions were.

F&L points out that issuing the policy was delegated to the solicitors. But that means the solicitors were effectively acting as its agents. They were appointed by F&L and entered into the contract with Mr D with its authority. F&L is responsible for their actions when issuing the policy on its behalf.

As I mentioned in the provisional decision, F&L didn't deal with Mr D directly. So it didn't, for example, ask him to complete an application or a proposal form. It left these matters to the solicitors. But since F&L remained responsible for the solicitors' actions, the onus is on F&L to explain how the decision to issue the policy was made on its behalf.

The only information I have is that Mr D provided a statement to the solicitors about what had happened. That was made some years after the event. It's likely his recollection had faded. The statement is undated and not in the form of a witness statement; it doesn't include a statement of truth.

I've seen emails Mr D sent to the solicitors after the exchange of evidence where he says he did not tell any lies and as far as he could remember, he didn't recall receiving any confirmation of a surrender. The solicitors say he didn't have copies of the correspondence that came to light after the exchange of evidence in the case.

Under the terms of agreement between F&L and the solicitors, the solicitors are required to carry out an assessment and vetting process before issuing the policy. F&L could have provided details to the solicitors of the information it needed, or what questions should be asked. I appreciate it wouldn't have been possible to ask specifically about a surrender agreement if its existence wasn't known. But this might include, for example, asking specific questions about whether the client has signed any documents and if so to provide copies of them, or to check what correspondence they have. There's no evidence that it did so.

F&L had the opportunity while investigating and responding to Mr D's complaint to look into what happened. It could have sought an explanation from the solicitors of how they had carried out the vetting process on its behalf, what questions were asked and how it made the decision to offer the policy. It doesn't seem to have done so, instead simply taking the view that Mr D must have known the information he provided wasn't accurate.

The solicitors were acting for Mr D. So F&L might not have been entitled to see all the information on their file or details of advice given to their client. But it would have been able to ask for information about actions the solicitors took when carrying out functions on behalf of F&L as its agent.

While F&L says this information should be requested directly from the solicitors, as I've explained it's for the insurer to show there was a misrepresentation.

When relying on a breach of a condition or an exclusion in a policy, the onus is on the insurer to show that there has been a breach or that the exclusion applies. Even if it has delegated certain actions to the solicitors, F&L remains responsible for them (and Schedule 2 of CIDRA sets out the circumstances in which an intermediary will be acting as agent for the insurer). And bearing in mind the requirements set out in CIDRA, it's for the insurer to demonstrate what questions were asked, what answer was given and that the answer wasn't correct. I don't think F&L has demonstrated any of these things. It can't simply point to the solicitors to address these points when they issued the policy on behalf of F&L.

For these reasons, it remains my view that the decision to void the policy wasn't fair. But it was fair to stop providing cover once it became clear Mr D's case didn't have reasonable prospects of success, as required by the policy terms.

Putting things right

F&L should not treat the policy as void and should:

- cover any disbursements that were incurred to 12 November 2021;

- cover any costs being claimed from Mr D by the defendant for the period up to 12 November 2021; and

- provide a letter for Mr D saying his policy was not void.

My final decision

I uphold the complaint and direct Financial & Legal Insurance Company Ltd pay compensation to Mr D as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 4 September 2023.

Peter Whiteley
Ombudsman