

The complaint

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

What happened

Ms P had landscaping work carried out at her property with which there were significant issues. In January 2023 she sought assistance from her policy in bringing a claim against the contractor. Amtrust asked one of its panel solicitors to assess whether it had reasonable prospects of success (a requirement of the policy).

That firm advised in March the financial searches it had carried out indicated the limited company which carried out the work didn't have the means to pay a successful claim. Ms P asked if a claim could be pursued against the director of the company personally as she'd paid him in cash so had a contractual relationship with him. The panel firm said it wasn't satisfied a contractual relationship existed here. Amtrust advised Ms P that she could obtain a legal opinion of her own if she wanted to challenge the firm's assessment.

Following further correspondence Amtrust agreed to fund a trace report but that didn't change the position on recovery against the limited company. Amtrust confirmed its position on funding and said Ms P could obtain her own legal opinion if she wanted to challenge what the panel firm said.

Ms P provided advice from a direct access barrister at the start of September. He thought a claim was likely to be successful but said the contract could have been formed with either the limited company or the director. He suggested issuing a letter before action to both those parties to see what their position on that was. But he confirmed there could only be one contract so if proceedings were issued against both parties one would have to fail and there would be a risk of incurring adverse costs. Amtrust said it wouldn't provide further funding for the claim without it being established who the correct defendant was.

Our investigator thought Amtrust was entitled to rely on the opinion from the panel solicitor when concluding Ms P's claim didn't enjoy reasonable prospects of success. She didn't think it was unfair of it to maintain its funding position in the light of the subsequent barrister's opinion. And as that advice didn't confirm the claim overall had prospects of success (because it remained unclear who it should be brought against) she thought it was reasonable of Amtrust to say it wouldn't reimburse Ms P for the cost of this.

Ms P didn't agree. In summary:

- She disputed the limited company wouldn't have the means to pay a successful claim as she believed it had professional indemnity insurance in place that would have covered any award (she said no company would be able to lawfully trade without this).
- She did have a personal contract with the director of the firm as the money she paid hadn't passed through his business and nor was the job declared through it. And the director did have assets so a claim against him would have good prospects of recovery.

She'd obtained a quote for remedial work which showed the claim was proportionate to pursue.

- Amtrust had agreed she could obtain a barrister's opinion. But it was at fault in advising if she did obtain one of her own it would then obtain its own opinion. And it said it would reimburse the cost of her opinion if it was supportive. As that was the case she thought it should do so.
- The opinion she'd obtained and the panel solicitors said the next step was to issue letters of claim to both defendants (and the legal helpline confirmed that could be done). And while one claim would fail the policy indemnity limit would be sufficient to cover this and any adverse costs.
- In any case doing so didn't mean significant costs would be incurred as it would have been a means of eliciting a response from the defendants. She asked why Amtrust hadn't agreed to do that. It had suggested the policy didn't cover speculative claims but that wasn't in the wording.
- The limited company had now gone into liquidation meaning the director was now responsible for any claims made against it. So her claim could proceed against him.

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 Ms P has found this a very difficult experience. I recognise that the problems with the work at her property would have been challenging to deal with in themselves. And she's also told us about serious health issues that also impacted her. I was sorry to learn about the impact of all of that on her. But the question I need to consider is what Amtrust did when dealing with the claim she made on her legal expenses policy.

In relation to that Ms P has made some very detailed submissions both in her initial complaint and in response to our investigator's view. I've read everything she's said but I don't think it's practical or in line with the informal nature of our service to respond to every point she's raised. Instead, I've sought to focus on what seem to me to be the key issues; those which would impact the outcome of the complaint.

I've looked first at the terms and conditions of her policy. This does provide cover for "*Costs to pursue a legal action following a breach of a contract you have for buying or renting goods or services for your private use. The contract must have been made after you first purchased this insurance unless you have held this or equivalent cover with us or another insurer continuously from or before the date on which the agreement was made*".

That means legal costs in relation to a contract Ms P entered into for the landscaping works at her property is something her policy could in principle cover. But it's also a requirement for cover to be provided that a claim has reasonable prospects of success. In relation to that the policy says "*at any time we may, but only when supported by independent legal advice, form the view that you do not have a more than 50% chance of winning the case and achieving a positive outcome. If so, we may decline support or any further support. Examples of a*

positive outcome are: Being able to recover the amount of money at stake; Being able to enforce a judgement; Being able to achieve an outcome which best serves your interests.”

So I think it was in line with the policy terms that Amtrust referred the matter to a panel solicitor so those issues could be considered. And its view was that Ms P's claim would be against the limited company and it didn't have sufficient assets to pay any award that was made against it. As a result there weren't good prospects of recovering the money at stake. I don't think it was unreasonable of Amtrust to conclude on the basis of that advice funding shouldn't be provided for this claim as the policy requirements hadn't been met. And that position was supported by the trace report it subsequently funded.

Ms P believes the limited company had professional indemnity insurance which would have covered her claim against it. However, I don't believe professional indemnity cover is a legal requirement for a construction company as Ms P has suggested. Nor does there appear to be any clear evidence of what cover the limited company did have. In any case the claim Ms P was seeking to pursue appears focussed on poor workmanship by her contractors (her counsel referred to "*sub-standard work carried out*") which isn't something professional indemnity insurance normally covers. And there isn't clear evidence the limited company had any other insurance that would cover the claim against it. So I don't think this was something Amtrust needed to consider when deciding whether Ms P's claim met the policy terms.

I appreciate Ms P has also focussed on a possible contractual relationship with the director of the limited company given she paid him direct for the work. She's also said the director has personal assets of his own so a claim against him would enjoy good prospects of recovery and that claim would be proportionate to pursue.

I don't think it's in dispute the director does have assets of his own. And based on the costs estimate provided by the panel firm compared to the value of the claim I think it likely this claim would be proportionate to pursue. But the difficulty for Ms P is that it's not clear she did have a contract with the director personally. When she raised that issue with Amtrust it asked the panel firm to consider the position on that. It said there was insufficient evidence to show Ms P had contracted with the director rather than the limited company. The firm said "*it remains our view it was the intention of the parties that the contract was to be between the company and yourself*".

I've also reviewed the barrister's opinion Ms P subsequently obtained. That said "*The initial quote was from the Limited Company. Works appear to have been carried out on behalf of the Limited Company*". And "*it is arguable as to whether payments made in cash were in effect to the [limited company] or [director]*". The opinion concludes "*a contract could have been formed either with the [limited company] or [director]*". It recommends issuing a letter before action to both defendants to elicit a response. Ms P says the legal helpline told her there was no reason why that couldn't be done.

That may well be the legal position. But the issue is whether taking those steps is something Amtrust should have funded under the terms of Ms P policy. She says the policy doesn't specifically exclude speculative claims. However, for cover to be available for any claim it needs to fall within one of the insured incidents set out in the policy. And the onus is on a policyholder to show their claim falls within one of those sections.

As I've already set out the cover under Ms P's policy is for "*Costs to pursue a legal action following a breach of a contract you have for buying... goods or services for your private use*". So for cover to be provided at all Ms P needs to show (on balance) that a contract is in place. In this case the panel solicitors initial view was that she didn't have a contract with the director. And her counsel didn't conclude she did but that a contract "*could have been formed*". The reason he advised issuing letters before action was to obtain further evidence on this. But it would only be on receipt of that information the position on who Ms P had contracted with could become clearer.

Given that I don't think Ms P has shown, as it stands, she did have a contract with the director. That means she hasn't shown an insured event covered by her policy has taken place. As it's for her to show that is the case I think it was fair of Amtrust to conclude it wouldn't provide funding to issue letters before action given this was primarily an information gathering exercise to try and establish the contractual position.

Turning to the cost of the barrister's opinion Ms P obtained I've considered whether Amtrust should reimburse the cost of that. I would expect Amtrust to have done so if that opinion had been positive on her claim's overall prospects of success (and so had reached a different view to the panel solicitors). It doesn't do that. It appears to acknowledge the position on prospects of recovery against the limited company as it says based on the most recent accounts "*total assets are only £18,978 with £136,902 being due to creditors within one year*". And while it accepts Ms P might have formed a contract with the director it doesn't confirm she has; it makes clear further information is required on that.

And I don't think Amtrust gave any indication to Ms P that it would pay for an opinion which wasn't supportive. So I don't think it does need to reimburse the cost she incurred here. I do agree it wrongly advised her that if she obtained her own barrister opinion it would then seek its own. And there were some other customer service issues during Ms P's claims journey. However, Amtrust has already paid £150 in recognition of that. I think that's fair taking into account the impact on Ms P of what it got wrong.

Ms P says as the limited company has now gone into liquidation the director would now be responsible for any claims against. I'm not persuaded that is the case. My understanding is directors are not typically held personally responsible for the outstanding debts of a business because the legal structure of the limited company protects directors from personal liability. However, if Ms P does have further evidence to show why the director in this case would be liable for the claim (or additional evidence which shows she did contract with him personally) I'd expect Amtrust to review matters if she provides that information to it.

My final decision

I've decided not to uphold this complaint/ Under the rules of the Financial Ombudsman Service, I'm required to ask Ms P to accept or reject my decision before 20 November 2024.

James Park
Ombudsman