

The complaint

Mr S' complaint is about a claim he made on his Amtrust Europe Limited ('Amtrust') after the event ('ATE') insurance policy, which was declined.

Mr S feels that Amtrust have treated him unfairly.

What happened

Mr S instructed a firm of Solicitors ('A') on a no win no fee basis to act for him in a claim concerning the installation of a cavity wall against a third party. A took out an ATE policy on Mr S' behalf to protect him against any adverse costs orders and disbursements that were payable in those proceedings. They also took out a litigation loan to cover their own costs and disbursements. It was a condition of that loan that ATE was in place in the event that Mr S' claim was unsuccessful.

In 2018 A discontinued Mr S' claim on the basis that the expert evidence they'd received was unresponsive and the Court had refused their application to vary the directions that were currently in place. A consequence of that discontinuance was that the third party was entitled to their costs incurred in defending the claim against them.

In 2021 A went into administration. A second firm ('B') was appointed to take on Mr S' claim. By this point Amtrust had told A that they were auditing all matters involving the same litigation loans that were the subject of Mr S' claim and would not be releasing any further funding. B said they would claim on Mr S' ATE policy with a view to discharging the litigation loan. In 2023 the third party sought their costs in defending the claim against them from Mr S directly.

Mr S made a claim on his Amtrust ATE policy. Amtrust said they weren't aware of any claims on the policy from B or anyone else. Following a review of the claim by Solicitors, Amtrust said Mr S had breached the terms of the ATE policy which had prejudiced their position. As such Amtrust said they weren't prepared to meet the costs the third party was claiming against Mr S, which he had discharged himself because a cost Order had been obtained against him.

Mr S feels that Amtrust have treated him unfairly. He wants to be reimbursed for the costs he's had to pay to the third party with interest as he says he had to take out a loan to cover them.

Our investigator considered Mr S' complaint and concluded it should not be upheld. Mr S doesn't agree so the matter has been passed to me to determine.

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.

Having done so, I don't uphold Mr S' complaint. I'll explain why. Before doing so I wish to

acknowledge Mr S' strength of feeling about his complaint and the various submissions he's made. Whilst I won't be addressing everything he's said, I can assure him I've considered it all when reaching my decision. That's not intended to be disrespectful, rather it represents the informal nature of the Financial Ombudsman Service.

The starting point is the policy terms. They contain the following conditions:

"2.1 We will not pay any claim under the Policy caused by or attributable to:

2.1.1 Your failure to obtain Scheme Manager's Approval to commence legal proceedings;

...

2.1.6 Your decision to abandon or discontinue the Litigation without the Scheme Manager's Approval;"

The policy also requires that the Scheme Manager must agree in writing to any disbursements being incurred in the claim before they're incurred.

It's not in dispute that A didn't obtain Amtrust's approval either to issue proceedings on Mr S' behalf or discontinue them and that disbursements were incurred without any reference to Amtrust in advance. The issue here is that Mr S doesn't appear to have been aware of any of this nor of his obligations under the policy.

Having considered extracts of A's file of papers provided by Mr S, I'm satisfied that A did send Mr S a copy of the ATE policy they arranged to take out on his behalf in January 2018. That policy defines "You" as the policyholder, so in this case, the responsibility lies with Mr S to obtain Amtrust's approval to either issue proceedings or discontinue them. I appreciate that the underlying claim was however handled on his behalf by A and that he expected A to ensure the policy terms were complied with. Whilst that's not unreasonable, that doesn't mean that Amtrust should cover his claim. And the policy terms make it clear that Mr S should *"supply a copy of the Policy to Your Solicitor with instructions to familiarise himself with it, observe its terms, and provide appropriate advice in order to enable You to comply with its terms."* In this case I'm satisfied that Mr S is in breach of the policy terms.

As the investigator said, in order for me to reach the conclusion that Amtrust need to do something more in this case, I would need to be satisfied that Mr S' breach of the policy conditions did not prejudice Amtrust's position. But I'm not persuaded this was the case here. Amtrust didn't have any say in whether litigation should be started or discontinued nor indeed whether disbursements should be incurred. Where ATE is in place, it's incumbent on a policyholder or their representative, to satisfy an insurer that the risk in proceeding or ceasing any legal action is best taken in the circumstances and that it's necessary and proportionate to incur disbursements. In this case no reference was made to Amtrust at all, and no advice appears to have been provided before steps were taken that would inevitably expose them to cost consequences, both in terms of the litigation loan and adverse costs. That's because proceedings were both issued and discontinued, and disbursements incurred on Mr S' behalf without any reference to Amtrust at all. From what I've seen there's both an outstanding litigation loan, which I appreciate Mr S is not being asked to pay, and an adverse costs order. There were also other issues that Amtrust was not aware of that increased their cost exposure such as the expiry of the limitation period for making the claim, which a Barrister had said needed to be considered more carefully before proceedings were issued. As far as I can see, this wasn't considered any further and proceedings were issued in spite of that advice. Because of this I think Amtrust's position was prejudiced. For these reasons I don't think I can fairly conclude that Amtrust should cover the costs that Mr S has incurred and pay his claim.

As Mr S is aware, I can't consider any complaints against A as they don't fall within my remit. Amtrust has said that Mr S should consider a claim in professional negligence against A

given their handling of his claim. Whilst I can't comment on that, Mr S is free to take independent legal advice on the options open to him about the adverse costs he's paid the third party in this case.

My final decision

For the reasons set out above, I don't uphold Mr S' complaint against Amtrust Europe Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 15 November 2024.

Lale Hussein-Venn
Ombudsman