DRN-5133946

The complaint

Mr A complains that Amtrust Europe Limited (Amtrust) made an unfair offer to settle a claim he made on a legal expenses insurance policy.

Mr A is represented in his complaint by his solicitor. Where I refer to Mr A within my decision, this should be taken to include his solicitor.

What happened

Mr A took out an after the event (ATE) legal expenses insurance policy with Amtrust as he was seeking to take legal action against a third party.

Mr A's legal action was unsuccessful, with the third party's costs being awarded against him. He therefore made a claim on the ATE policy and Amtrust were notified of the costs being sought by the third party.

As no counter offer was made or agreement reached with the third party Mr A has been held liable for the third party's claimed costs. These amount to more than £50,000.

Amtrust paid Mr A £25,000 in settlement of the claim, as it said this was the maximum payable under the terms and conditions of the policy.

Mr A was unhappy with this offer and complained to Amtrust. He said Amtrust had been notified of the claim and amount being claimed in line with the terms and conditions of the policy but hadn't responded, which prevented him from making a counter-offer or reaching an agreement with the third party.

When Amtrust rejected his complaint, Mr A referred it to our service. Our investigator thought Amtrust's offer to settle the claim was reasonable and in line with the policy limits but that it should have responded to Mr A sooner. She thought Amtrust should pay £750 to recognise the distress caused to Mr A.

Amtrust accepted this, but Mr A didn't and asked for a final decision. He argued that the costs would have been lower if Amtrust had properly responded to the claim. He additionally said the applicable policy limit is £50,000 and so any settlement should reflect that.

In response to our investigator's view, Mr A (via his solicitors) raised the additional point about the settlement limit. Both parties agreed to us considering this as part of Mr A's original complaint. I therefore issued a provisional decision to address this further point, as well as the original complaint.

My provisional decision

In my provisional decision, I said:

There are two reasons why Mr A believes Amtrust should pay more than it offered in settlement of the claim. Firstly, he says that the third party's costs would have been reduced if Amtrust had responded when he informed it of the claim. Secondly, he says that the

applicable policy limit is £50,000, not £25,000 as Amtrust has said. I'll address these points separately.

The notification to Amtrust

Amtrust now appears to acknowledge that on being notified of the third party's costs, it didn't take appropriate action by responding and accepting or further discussing the proposals of Mr A's solicitors on the next steps. It agreed with our investigator that it should pay £750 compensation to recognise the impact of its inaction.

I'll address whether I think the compensation offered is fair below, but I'll first address the argument made by Mr A that Amtrust's inaction means it should be liable for the full amount of the third party's costs. In suggesting this, Mr A refers to a condition of the policy which says Amtrust won't pay any claim "*caused by or attributable*" to:

Your decision to make an offer to settle or compromise opponent's costs without the scheme manager's approval.

For the purposes of my decision, it's agreed the scheme manager here would be Amtrust.

It's accepted that Mr A received notification of the third party's costs and these were communicated within a reasonable timeframe to Amtrust. It's also agreed that multiple attempts were made by email to obtain a response from Amtrust. It was suggested from the outset that the third party's costs were higher than expected and it was proposed that Amtrust should appoint a costs draftsman to carry out an assessment.

Mr A's position is that the policy condition meant that in the absence of any response from Amtrust to the notification of the third party's costs, he was unable to make any counter-offer to settle the claim or appoint the costs draftsman which had been proposed.

I note Mr A's belief that the third party's costs were excessive, and so would have been reduced significantly if Amtrust had agreed to instruct the costs draftsman or make a counter-offer. However, I can't say with any certainty that this would have happened. I can't say whether a counter-offer would have been accepted, or for how much, I also can't say what a costs draftsman would have concluded were reasonable costs. The matter of costs may still have been referred to court and I similarly can't reach any conclusion about what costs Mr A would have been ordered to pay.

There's another point that I think should be addressed here, which is that notwithstanding the policy condition, Mr A had a duty to seek to mitigate his loss. The policy terms and conditions say he had to "*take all reasonable steps to avoid or minimise opponent's costs.*"

It would seem that other than sending the notification to Amtrust and then seeking to chase this, with no response, Mr A took no other steps to reduce the costs. The various emails to Amtrust covered a period of more than six months before Amtrust made any settlement, but during that time it doesn't seem that Mr A engaged with the third party to seek to reduce the costs. I haven't seen any evidence that Mr A indicated to Amtrust that in the absence of a response, he'd be making a counter-offer or seeking to settle the costs.

I agree that Amtrust should have responded to the emails about the costs, but don't agree that it would be fair to require Amtrust to pay the full costs. I can't conclude that a response at the appropriate time and further action in line with Mr A's requests would have reduced the costs, and also I can't agree that Mr A acted to mitigate his loss when no response was received from Amtrust.

That being said, it is evident that Amtrust's lack of response would have had a significant impact on Mr A. It should have responded to the emails. Mr A would have been aware of the level of costs and the lack of a response about how (or indeed whether) Amtrust intended to settle the claim would have caused him distress. While I can't hold Amtrust liable for the costs being in excess of £50,000, I do think the frustration and upset caused by its inaction should be recognised, and that the £750 suggested by our investigator is a reasonable amount in the circumstances.

The policy limit

Amtrust offered £25,000 to settle the claim, saying this was the maximum payable on the policy. Mr A says the limit should be £50,000. The relevant section of the policy defines the "*maximum limit*" as "*The total aggregate payment that we will pay under the policy specified in paragraph 5 of the schedule.*"

Mr A's policy schedule says the maximum limit is:

Pre-issue of proceedings: £25,000

Post-issue of proceedings: £25,000

Mr A's argument would therefore seem to be that these amounts should be taken to effectively combine to make £50,000 in total.

Amtrust says that the limit is £25,000, but that which limit is applied (at least in theory given they are the same amount) depends on at what stage of proceedings a claim is made.

The policy terms and conditions don't go into any further detail about how the policy limits set out in the schedule apply, or when, so I need to consider whether a fair and reasonable interpretation of the stated limits means that they would combine to form a £50,000 limit.

At this point I think it's important to consider the intention of Mr A's ATE policy. The Key Facts document which formed part of the terms and conditions says the policy provides cover "*for opponents' costs if you become liable to pay those costs as well as certain of your own expenses.*" In effect, it was intended to provide cover if Mr A's legal proceedings were unsuccessful, as proved the case.

Nowhere within the documents is it suggested that there is a limit of £25,000 for costs incurred before legal proceedings are issued, with a further £25,000 limit for costs incurred after proceedings are issued. I think it's notable that the limit isn't stated as being £50,000, with a maximum of £25,000 for pre-issue costs and £25,000 for post-issue costs.

The policy accepts that a claim could be made at any point during the proposed legal action, whether that be before proceedings are issued or after. The policy doesn't exclude cover if a claim is made before proceedings are issued.

The policy schedule is unique to Mr A's policy, whereas the policy terms and conditions apply to a range of policies offered by Amtrust. The applicable pre- and post-issue limits may be different between these policies, with lower amounts for either limit potentially applying.

I think therefore that a reasonable interpretation of the cover limit, when taking into account the intention of when the policy cover will be used and the policy terms and conditions, is that the limit of cover is £25,000.

I'm also aware that Mr A's solicitors, who have suggested that the policy has a total limit of

£50,000 was provided with a terms of business agreement by Amtrust and this says that the policy limit for claims of the type Mr A was making is £25,000, with no indication that the limit was £50,000 or that a combined limit would apply.

I'm therefore satisfied on balance that the applicable policy limit for Mr A's policy was £25,000. The distinction between pre-issue of proceedings and post-issue of proceedings is to show the limit which applies depending on when the claim is made. If the intention was for these limits to be combined to make a £50,000 total, I think this would be stated.

The responses to my provisional decision

Amtrust had no further comments in response to my provisional decision.

Mr A's response didn't accept my provisional decision. He said if Amtrust had sought to challenge the costs, it's likely they would have been reduced significantly from the amount claimed by the other party. He maintained the policy terms and conditions meant that in the absence of any response from Amtrust, he was unable to challenge or seek to negotiate the costs.

Mr A also argued that the "*total aggregate limit*," as a layperson, meant the total of the pre-issue and post-issue limits. He believed in the absence of anything to clarify this, the limit should be interpreted in his favour.

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 don't intend to repeat the contents and reasoning of my provisional decision which I've set out above.

In the absence of any further comment from Amtrust, I assume it accepts my findings and that it should pay the compensation that has been suggested by our investigator and in my provisional outcome.

I understand Mr A doesn't accept my outcome, and his primary reason for doing so seems to remain that Amtrust's failure to respond to his solicitor's contact about the costs mean that these couldn't be defended or negotiated. I agree that this would be the primary argument, as if I considered the failures on Amtrust's part were the reason why the costs exceeded even the lower limit, then I'd be minded to say that limit shouldn't apply.

I've considered Mr A's point regarding the costs, and he's pointed to evidence from his solicitor as to why he thinks that negotiation or even a defence in court of the costs would have resulted in him (and by extension Amtrust) being liable for a lower amount. This centres on the solicitor's experience of such matters and comparison to other cases.

The issue here is that simply because other cases have resulted in settled costs being lower than the originally claimed amounts doesn't mean I can say this would have happened here. No reference has been made to, for example, specific cost items which would have been negotiated down or removed entirely from a negotiated settlement, or ruled by a judge to be unreasonable. I don't think I can say that the solicitor's contention that the costs would have been lower, without detail as to what specific costs would have been excluded or reduced, means I can conclude Amtrust's failure to engage was the main reason for the final cost amount being awarded.

I note Mr A's view about the obligations placed on him by the policy terms and conditions which say Amtrust must be involved in the settlement or negotiation of costs. As I've said before, however, he has a duty to mitigate his loss wherever possible. It would have been clear for several months before the default judgment on costs that Amtrust hadn't responded to requests to engage.

I think a reasonable course of action would have been to seek to reduce the costs, putting Amtrust on notice that Mr A was doing so in the absence of any response from Amtrust. It's unclear why, if Mr A's solicitors were certain that with or without Amtrust's involvement, the costs could be negotiated or reduced (as they now appear to be), they didn't follow this course of action.

With regards to the policy limits, this appears to be a matter of interpretation. I understand Mr A's position that he believes it should be interpreted as a £50,000 total limit. I don't agree with this, as my interpretation is that there is a £25,000 limit, for the reasons I previously gave. I can't agree that the "*aggregate*" should be interpreted to mean the two limits, but should be taken to mean the aggregate of the costs claimed.

As I said previously, the only limit which is mentioned in any document is £25,000, both in the documents provided to Mr A and the terms of business shared with the solicitor. I think if the limit was intended to be £50,000 that would be stated.

As neither party has commented on the £750 compensation that was suggested, I don't intend to address this further. As I said previously, I think that is a fair amount given the impact on Mr A of Amtrust failing to respond.

My final decision

I uphold Mr A's complaint in part. To put things right, Amtrust Europe Limited must pay Mr £750 compensation. It must pay this amount within 28 days of us telling it Mr A accepts our decision. If it doesn't, it must pay simple interest at a rate of 8% per year from that date to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 31 December 2024.

Ben Williams
Ombudsman