

## The complaint

P, a limited company, complains about what Amtrust Europe Limited did after it made a claim on its legal expenses insurance policy.

## What happened

In September 2020 P sought assistance from its legal expenses policy. It said there had been countless problems with a new website provided by a developer it contracted with. And it wanted funding to pursue a claim against them. Amtrust initially said the claim was caught by a policy exclusion. However, after reviewing further evidence it said that wasn't the case and asked a firm of panel solicitors to consider whether the claim had prospects of success (a requirement of the policy). That firm concluded in April 2021 it didn't. Amtrust issued a final response to a complaint P made the following month giving it six months to refer the matter to our service. It didn't do that.

In January 2024 P contacted Amtrust again and said the case had been progressed with some assistance from its own solicitor. And they said it did have prospects of success. It asked if Amtrust would provide funding to bring it to a conclusion. Amtrust asked P to obtain counsel's opinion on prospects of success (the cost of which it would reimburse if it was positive). Counsel advised in March 2024 that action against the developer for failure to comply with a previously obtained court order would have reasonable prospects of success.

The following month Amtrust said having reviewed the file and counsel's opinion it thought the exclusion it had previously relied on did in fact apply to the claim. That said the policy didn't pay any claims relating to "*computer hardware, software, internet services or systems which...have been tailored to your requirements*". It accepted it had been in error in previously saying that didn't apply and offered to pay P £350 in recognition of the inconvenience it had been caused.

Our investigator agreed the exclusion did apply and thought it was fair of Amtrust to decline the claim on that basis. However, P should have been informed of that sooner. He thought in addition to paying P £350 Amtrust should cover any legal costs it incurred during the period in which the claim had been accepted (which he thought was January to April 2024) including the cost of obtaining counsel's opinion.

Amtrust didn't respond to his view. P didn't agree with what he said. In summary:

- It asked why Amtrust had initially agreed to accept cover if it thought the exclusion applied. And it said Amtrust had confirmed in an email of 24 January 2024 that it would reinstate cover for the claim subject to counsel confirming it had prospects of success.
- It was unacceptable for it to retrospectively change its position on that. It thought this was in breach of the Misrepresentation Act 1967 in particular as it related to a person entering into a contract after a misrepresentation had been made which had caused them to suffer loss as a result.

- And it raised concerns about how the panel solicitors Amtrust first referred the claim to had dealt with the matter and their conclusion the claim didn't have reasonable prospects of success.

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've looked at the terms and conditions of P's policy. The legal expenses section does provide cover for 'Contract and Debt Recovery' and I think it's accepted the dispute P had with the developer would in principle fall within that section. But there's an exclusion to cover for any claim relating to "*computer hardware, software, internet services or systems which (a) have been supplied by you; or (b) have been tailored to your requirements*".

I've considered first whether Amtrust correctly concluded that applied here. Clearly no computer hardware, software, internet services or systems were supplied by P. So the question is whether it entered into a contract for any of those items which were tailored to its requirements. I understand when P contacted Amtrust in October 2020 it said in relation to the website which forms the subject of its claim "*this is something we cannot buy 'off the shelf' to the best of my knowledge there is no such thing buying off shelf for any Travel Agent / Tour Operator. Under this site solely and fully developed for our company...*".

The counsel's opinion P obtained in March 2024 said "*In February 2019, an agreement was executed between [P] and [developer] under which [developer] committed to creating and providing twelve months of maintenance and support for an online platform tailored to [P's] specifications*". All that suggest to me that the services being provided in this case were ones which had been tailored to P's requirements. And I think the website in this case would reasonably be classed as an 'internet service' given it provides a means for a consumer to access P's services through the internet.

I think Amtrust has shown, on balance, the exclusion applies. But it was wrong to tell P it didn't in December 2020. And it should also have made clear it applied when P got back in touch in January 2024. So it has been at fault here. As that's been established I don't consider I need to look further into why that error occurred. What I need to think about is the impact on P of that failing.

P's position is that Amtrust shouldn't now be able to go back on the commitment it made in January 2024 to provide cover on receipt of a positive counsel's opinion. However, under our rules we're required to decide complaints by reference to what is fair and reasonable in all the circumstances of the case. And our general approach is that, having established a business made a mistake, we'd move on to think about what the impact on a complainant had been of that error, thinking about whether (and how) they'd have acted differently but for that mistake. And, if they would have acted differently, whether that's resulted in a loss to the complainant which the business needs to put right.

P has cited the Misrepresentation Act 1967 in support of its position. But even if that applies here I don't think it gives rise to different considerations to those I've already cited. The Act says where a person has entered into a contract following a misrepresentation by another party, and that person has suffered loss as a result, the person making the misrepresentation could be liable for any loss. That's effectively the test I've already set out.

I don't think P would have acted any differently if its claim had been declined for the correct reasons in 2020. I say that because, having been made aware cover wasn't available (because the claim didn't have reasonable prospects of success), P continued to pursue it (including paying for advice from its own solicitors). I've seen nothing to suggest it would have acted any differently if provided with the correct reason why the claim had been declined. So while I appreciate P does feel these are costs Amtrust should cover (it's provided a spreadsheet setting out what was spent in this period) I don't agree. Those costs weren't incurred as a result of what Amtrust got wrong.

However, Amtrust should also have told P in January 2024 the exclusion meant cover wasn't available for its claim. Instead, it advised it to obtain counsel's advice and clearly indicated that on receipt of a positive opinion cover would be reinstated. So I think it's right the costs of that opinion are reimbursed to P (if that hasn't already taken place) because that wouldn't have been sought if P had been given correct information. And given the opinion was positive I think P had a reasonable expectation that any costs it incurred from 24 January 2024 until the claim was correctly declined on 11 April 2024 would be covered by its policy.

Our investigator said Amtrust should therefore cover reasonable costs P incurred in pursuing its claim that fall within that period. Amtrust hasn't responded to his view and, in the absence of any counter argument from it, I don't have grounds to take a different view on this point. I also agree the £350 Amtrust has already agreed to pay does enough to recognise the avoidable inconvenience P was caused as a result of what Amtrust got wrong.

P has also reiterated concerns about Amtrust's decision to decline the claim it made in September 2020 on the basis of the negative prospects assessment provided by the panel firm. However, that isn't something I'm considering in this decision. That issue was addressed by Amtrust in a final response dated 25 May 2021 which gave P six months from the date of that letter to refer the matter to our service. P didn't do so within that period. That means if P does now want us to consider this issue we'd first have to consider whether we had jurisdiction to do so. That would include considering whether there were exceptional reasons why the complaint wasn't referred in time.

If P want us to do that it should let our investigator know. However, I've already concluded the exclusion has been correctly and fairly applied meaning that regardless of the position on prospects of success the claim wouldn't be covered in any event. That's something P may wish to take into account when deciding whether this is an issue it wants to pursue.

### **Putting things right**

Amtrust will need to reimburse P for any reasonable and necessary costs it incurred in pursuing its claim between 24 January 2024 until 11 April 2024 (including the costs associated with obtaining counsel's opinion if that hasn't already been done). It will also need to pay P £350.

### **My final decision**

I've decided to uphold this complaint. Amtrust Europe Limited will need to put things right by doing what I've said in this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask P to accept or reject my decision before 13 March 2025.

James Park

**Ombudsman**