

The complaint

A limited company, that I'll refer to as S, has complained that Arthur J. Gallagher Insurance Brokers Limited mis-sold its "Contractors Combined" insurance policy.

Mr D, as a director of S, has brought the complaint on its behalf.

What happened

S has used Arthur Gallagher as its insurance broker to arrange its business cover since 2017. In December 2022, S contacted Arthur Gallagher as it wanted to see if there was cover under its policy to cover the legal expenses of defending a claim being made against it by a client. Arthur Gallagher told S that the policy did not cover legal expenses in relation to contract disputes. Arthur Gallagher arranged to add legal expenses cover to S's policy, which was done in March 2023.

S therefore instructed their own legal representatives to fight the claim. S was successful and the claim against it was dismissed, with costs awarded in its favour. However, in December 2024, the same claimant brought a new legal action against S.

S made a claim under the policy but as the circumstances of the dispute arose before the start of the legal expenses cover in March 2023, the insurer would not cover it.

S complained to Arthur Gallagher. S says it was not provided with a copy of the policy terms in December 2022, so could not check whether what Arthur Gallagher said about the cover was correct and if legal expenses cover was not included in the 2022 policy, it had been sold an unsuitable policy. S says that given the type of work it is involved in, legal expenses should have been included in its policy.

Arthur Gallagher accepts that it could have added legal expenses cover to the policy sooner than it did but says this error has not caused any financial loss to S. It says this is because the policy only covers claims which occur within the policy year and the claim relates to events in 2022, so the policy in place now would not cover it. And, even if a policy had been in place in 2022, S had no financial loss then as its costs were recovered from the other party. Arthur Gallagher did, however, agree to pay S £150 compensation for the trouble caused.

As S remained unhappy with this response, it referred the complaint to us.

One of our Investigators looked into the matter. The Investigator said that Arthur Gallagher had sold the policy on an advised basis and so had an obligation to take reasonable steps to ensure the suitability of its advice. She considered that legal expenses cover should have been recommended at the initial sale in 2017 and at each renewal since and the fact it wasn't meant S did not have cover for the claim in 2024. She did not agree that the claim would not be covered in 2024 because it arose in 2022, if there had been continuous cover in place.

The Investigator therefore recommended that Arthur Gallagher find out what the premiums

would have been and S should pay those from 2017 when the policy was first sold; and that it should appoint a claims-assessor to assess whether the claim would have met the policy terms, if cover had been in place since 2022, and indemnify the costs that would have been covered.

S accepted the Investigator's assessment but asked what happens with the fees already incurred.

Arthur Gallagher did not respond, so the matter was passed to me.

I issued a provisional decision on the matter in January 2025. I provisionally decided that the policy had been mis-sold and as a result Arthur Gallagher should take steps to establish whether S is without cover put that right. I have copied the relevant parts of my provisional decision below:

"The Insurance Conduct of Business Sourcebook says that those selling insurance have a responsibility to provide clear, fair and not misleading information about the cover being provided, in order to put the customer in a position where they can make an informed choice about the insurance they are buying. This includes providing clear information about the main cover and any significant terms. If the seller is also making a recommendation or advising a customer to take a particular policy, then they should specify the customer's demands and needs and propose a policy that's consistent with them and take reasonable care to ensure the suitability of its advice.

As this complaint arises from the inability to claim under the 2022 policy, I think it is reasonable to treat this as a complaint about the 2022 only. While I have taken account of events from previous sales where relevant, I am only considering therefore what happened [during the sale] in 2022.

The sale of this insurance [in early 2022] was carried out on an advised basis, so Arthur Gallagher had a responsibility to ensure the suitability of its advice and that it was recommending a policy that met S's insurance needs as far as reasonably possible.

S is involved in construction work, so it seems to me that the possibility of legal contract disputes would be a natural concern and would reasonably be something an insurance broker should discuss. I also note that legal expenses cover was available as an optional add-on with the policy that was recommended to S each year. However, I cannot see any evidence that legal expenses cover was discussed at all, or any reason why it was not included in the policy cover recommended to S at any stage during the 2022 renewal of this policy. I am pleased to note that Arthur Gallagher seems to accept this, as it confirmed it should have offered legal expenses cover sooner than March 2023.

It is therefore my opinion that S should have been offered a policy with legal expenses cover included. The premiums for such add-ons are not usually significant in relation to the overall premium. Given this, if legal expenses had been recommended, I think it is likely S would have accepted that recommendation.

I therefore have to now consider the impact, if any, the fact that the business insurance policy was mis-sold to S in 2022.

Arthur Gallagher says there is no impact because there was no valid claim in 2022 because S had its costs paid by the other party and the current claim is not covered because it arises from events that occurred before the start of the 2023 policy year.

I do not agree that there has been no financial loss to S. The legal expenses cover does limit claims to events that occur within the period of insurance. However, a legal expenses insurer will not generally refuse a claim that arose before a particular policy year, if there was continuous legal expenses cover in place that covers the period during which the event first occurred. If S had legal expenses cover with the policy recommended by Arthur Gallagher in 2022 onwards, there would have been cover in place when the event giving rise to the claim in 2024 first arose and it seems likely to me that the insurer would therefore have considered both claims (the 2022 one and the 2024 one) and would not have rejected the 2024 one based on the date of occurrence.

There may be other terms and conditions that might apply to the claim, so I cannot say with certainty at this stage if the claim would have been covered but I do not think it would be automatically rejected on the basis of the date of occurrence.

Arthur Gallagher effectively needs to “*step into the shoes*” of the insurer. In order to do that fairly, I think it should appoint an expert independent legal expenses claims-handler to assess the claim against the policy terms on the basis that cover had been in place since 2022.

If it is assessed that S’s claim would have been covered, then Arthur Gallagher would be responsible for indemnifying S’s legal costs in line with the policy terms and conditions. As legal expenses policies only generally cover reasonable costs, it would be entitled to have the costs assessed for general reasonableness. This means, just by way of example and in no way suggesting this to be the case, that it would not be fair for Arthur Gallagher to have to pay costs incurred as a result of S going against reasonable legal advice. However, I do not think Arthur Gallagher would be entitled to impose policy conditions relating to any hourly rate charged, or any requirement to use the insurer’s own chosen solicitors. I say this because S has had no choice but to appoint its own solicitors ... and would not have had any power to negotiate their hourly rates in line with any panel rates.

I also think it should reimburse any costs that fall to be covered under the policy that S has already paid, with interest at our usual rate. Legal expenses policies will usually only pay unrecovered costs and so interim payments are not always paid, as the liability under the policy will not always be known until a case has concluded. However, if S had been able to claim under the policy, S would likely have used ... panel representatives, and as such would not have had to make interim payments. As a result, it has been out-of-pocket and this needs to be put right.

If costs are recovered from the other side that have been paid by Arthur Gallagher it would be entitled to recovery of any such amounts.

I agree with the Investigator that putting S back into the position it would have been in had the policy not been mis-sold [in]...2022 ... would also mean that S has to pay for the legal expenses cover, so any premiums that would have been charged and the excess (payable on a valid claim) can be deducted from the costs payable to S. If no costs would have been payable, S will still be required to pay the premium.

Finally, I agree that some additional compensation is appropriate. As S is a limited company it cannot experience distress but I appreciate this would have caused inconvenience to the operation of the company. I think the sum of £250 is appropriate.

My provisional decision

I intend to uphold this complaint against Arthur J. Gallagher Insurance Brokers Limited and require it to do the following:

- appoint specialist legal expense claims-handlers or claims-assessors to assess S's claim against the remaining terms of the legal expenses cover (other than the date of occurrence and any conditions about the terms agreed with solicitors) that should have been sold to S in 2022.
- Indemnify S for any costs that are assessed as being covered going forward, in line with that cover.
- If S has already paid for legal fees incurred from the date cover should have been provided, Arthur Gallagher should reimburse it for those costs in full, up to the policy limit, less the appropriate premium that would have been charged for the 2022 policy and the claim excess. Arthur Gallagher should also pay interest on any costs to be reimbursed at 8% simple per annum from the date S paid them to the date of reimbursement. (As explained above, Arthur Gallagher would be entitled to have any costs assessed for reasonableness generally but it has lost the right to impose any policy terms about level of fees.)
- Pay S the sum of £250 for the inconvenience caused."

Responses to my provisional decision

I invited both parties to respond to my provisional decision with any further information or evidence they want considered.

Arthur Gallagher has confirmed receipt of my provisional decision but has not added anything further.

S has also confirmed receipt of my provisional decision. It confirms it accepts my provisional decision but has also raised some further points of concern. S asks that I do the following:

- direct in my final decision that the claims-handler instructed, to assess the claim against the policy terms that should have been sold to it in 2022, and the terms in place in 2024, be entirely independent from Arthur Gallagher.
- Confirm the claims-assessors are paid for by Arthur Gallagher; and
- given the delays so far of over 14 months, including deliberate time-wasting on Arthur Gallagher's part in asking for an extension to respond to the assessment and then not bothering to respond, specify a time by which the claims-assessors are to be instructed.

S has also said that I referred in my provisional decision to legal cover but not to indemnity. It assumes this is because indemnity will be confirmed once the insurance claims-handlers have assessed and made a decision on the legal cover. And it asks whether Arthur Gallagher has put its own insurers on notice?

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.

Neither party has provided any further information or evidence about my provisional finding that Arthur Gallagher mis-sold S its business insurance policy in 2022 and that it should have offered S a policy with legal expenses insurance cover included. I therefore see no reason to change my finding about this and I remain of the opinion that the policy was mis-sold.

Arthur Gallagher has not made any representations about how I proposed that this be put right. I therefore also remain of the opinion that it should effectively “*step into the shoes*” of the insurer, as if legal expenses cover had been in place in 2022.

I stated in my provisional decision that in order to do that fairly Arthur Gallagher should appoint an expert independent legal expenses claims-handler to assess the claim against the policy terms on the basis that cover had been in place since 2022.

I confirm again that I would expect that assessment to be carried out independently, as only an independent expert legal expenses claims-handler or assessor will have the relevant knowledge and experience to assess the claim properly. And if legal expenses cover had been in place at the relevant time, the insurer would have likely used independent claims-handlers in the same way.

I also confirm that the services of the claims-handlers or assessors are to be paid for by Arthur Gallagher and that cost should not impact the limit of indemnity that should be applied to the claim if it is determined that it would have been covered (which appears to be £100,000).

I also stated in my provisional decision that, if it is assessed that S’s claim would have been covered, then Arthur Gallagher would be responsible for indemnifying S’s legal costs in line with the policy terms and conditions, except that I do not think Arthur Gallagher would be entitled to impose policy conditions relating to any hourly rate charged, or any requirement to use the insurer’s own chosen solicitors, as S has had no choice but to appoint its own solicitors and would not have had any power to negotiate their hourly rates in line with any panel rates. This remains my opinion.

I also provisionally determined that Arthur Gallagher should reimburse any costs that fall to be covered under the policy that S has already paid, with interest at our usual rate.

S is correct that indemnity for any legal costs already incurred, or for any future costs, will only be confirmed once its claim has been assessed and shown that it would have been covered if the appropriate policy had been in place in 2022.

I can appreciate S’s concern that matters move on promptly now, given that the proceedings against it have been ongoing for some time. Respondent businesses are expected to act on any final decision (that becomes binding once it is accepted by the complainant) reasonably promptly. However, I am going to direct that this instruction be put into action within 28 days of the acceptance of the decision.

Neither party has commented on the compensation I provisionally proposed, so I also remain of the opinion that the sum of £250 is reasonable. Finally, with regard to whether Arthur Gallagher has notified its indemnity insurers of this complaint, is not a matter for me. So I am unable to take this any further.

My final decision

I uphold this complaint against Arthur J. Gallagher Insurance Brokers Limited and require it to do the following:

- within 28 days of S confirming acceptance of my decision, appoint specialist independent legal expense claims-handlers or claims-assessors to assess S's claim against the remaining terms of the legal expenses cover (other than the date of occurrence and any conditions about the terms agreed with solicitors) on the basis that cover was in place in 2022.
- Indemnify S for any costs that are assessed as being covered going forward, in line with that cover (save for any terms about the legal representatives' hourly rates).
- If S has already paid for legal fees incurred from the date it is assessed that indemnity would have been provided (if cover had been in place in 2022) Arthur Gallagher should reimburse it for those costs in full, up to the policy limit, less the appropriate premium that would have been charged for the 2022 policy and the claim excess.

Arthur Gallagher should also pay interest on any costs to be reimbursed at 8% simple per annum from the date S paid them to the date of reimbursement. (As explained in my provisional decision and above, Arthur Gallagher would be entitled to have any costs assessed for reasonableness generally but it has lost the right to impose any policy terms about level of fees.)

- Pay S the sum of £250 for the inconvenience caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 12 March 2025.

Harriet McCarthy
Ombudsman