

The complaint

Mr and Mrs G's complaint is about the handling of claims made under the legal expenses section of a household insurance policy by AmTrust Specialty Limited. The complaint is about claims made by Mr G, and he has been the main correspondent throughout, so I will refer to him throughout.

AmTrust Specialty Limited is the underwriter of the policy, *i.e.* the insurer. Part of this complaint concerns the actions of the agents it uses to deal with claims on its behalf. As AmTrust Europe Limited has accepted it is accountable for the actions of the agent, in my decision, any reference to AmTrust Specialty Limited includes the actions of the agents.

What happened

In late 2020, Mr G made a claim under his policy with AmTrust, as he wanted to take legal proceedings against the developer of his new home. Mr G had already obtained advice from a solicitor that his legal claim had more than a 55% chance of succeeding. However, AmTrust said it wanted to get one of its panel of pre-approved solicitors to assess the claim. Mr G therefore provided all the relevant information for the panel solicitors at the beginning of February 2021.

In March 2021, the panel solicitors wrote to AmTrust and said they did not think there were reasonable prospects of the claim succeeding because Mr G should go through an alternative dispute resolution process first and any court action may be seen as an abuse of process because Mr G had made previous claims against the developer. AmTrust rejected the claim based on this advice.

Mr G was not happy with this. He says the opinion from the panel solicitors was by an unnamed paralegal when his opinion was from solicitors experienced in construction disputes. In March 2021, Mr G's solicitors said they would continue the matter on his behalf and would not challenge the decision about cover at that time but reserved his right to do so in the future. This appears to have been because they considered AmTrust had said there was no cover for the legal costs incurred during the alternative dispute resolution process anyway.

In October 2022, Mr G's solicitors contacted AmTrust again and challenged the assessment of the claim. AmTrust asked for written reasons to support the challenge. AmTrust says nothing was provided in response.

I understand in the meantime, Mr G went to mediation with the developer but this was not successful and his solicitors issued a pre-action letter in August 2022. In June 2023 the warranty insurer settled and paid a settlement of £32,000. (Coincidentally, AmTrust is the warranty insurer for the developer. Mr G thinks this caused some confusion on AmTrust's part but ultimately it has not impacted the claim or complaint.)

Mr G contacted AmTrust again to inform it that he had succeeded in the claim for the build issues and had been paid compensation and the cost of remedial works. Mr G says this proves his claim had reasonable prospects all along and so asked AmTrust to reimburse his legal costs, which I understand were around £12,500.

Mr G also says he still has a claim for unrecovered losses and general damages from the developer but if he'd had assistance under the policy, everything would have been claimed in one go and it would have been settled sooner than it was.

AmTrust refused to reimburse any costs. It said it was entitled to reject the claim in 2021 and the policy does not cover costs incurred before AmTrust has accepted the claim. AmTrust said it had told Mr G and his solicitors how to challenge its decision on cover and this was never done.

Mr G is very unhappy with this and complained to AmTrust. He made separate complaints about various issues involving AmTrust's handling of his claims. The main crux of the complaint however is that he says his solicitor's opinion should have been preferred but alternatively, AmTrust should have appointed a barrister to reassess the claim in February/March 2021 in the face of the two conflicting legal opinions; or should have met costs of his solicitors to explain why the panel solicitors were wrong.

Mr G says he was misled by AmTrust into thinking he had no cover until the point that proceedings were issued. He says he expressed dissatisfaction with this at the time but this was not treated as a complaint and he was not given referral rights to us. He also says AmTrust was disparaging about his own solicitor's legal opinion and therefore the validity of their legal opinion and said they were biased.

Mr G referred a complaint to us about the failure of AmTrust to treat his complaint properly and in line with relevant regulations. He also raised that AmTrust failed to consider his individual circumstances when handling his claim, which includes his and his wife's age and other vulnerabilities.

One of our Investigators looked into the matter. He did not recommend the complaint be upheld, as he was satisfied that AmTrust was entitled to reject the claim based on the legal advice it received and it had told Mr G how to challenge this at the time. The Investigator also said that he could not see that Mr G had asked for any reasonable adjustments and he was professionally represented. He did not think there was any evidence of unfair treatment. The investigator also said that the service AmTrust provided was not always what Mr G was entitled to expect but there was no evidence this had impacted the outcome of the claim or caused any other significant impact.

Mr G did not accept the Investigator's assessment. He made a number of points in response. I have considered everything he has said but have summarised his main points below:

- His solicitor wrote to AmTrust in March 2021 to say it reserved his right to challenge its refusal of his claim until after the dispute resolution service process and AmTrust confirmed in response that it had no issue with that. The reservation of his rights was accepted by AmTrust and therefore “stands as a matter of law.” And AmTrust is in effect estopped from now contesting his right to challenge its decision now. The Limitation Act means he has until around February 2026 to challenge AmTrust’s refusal of his claim.
- If he had issued proceedings before the dispute resolution process had been completed, it might have been considered an abuse of process.
- The fact he proceeded with the alternative dispute resolution process was of benefit to him and AmTrust, as no barrister’s fees were incurred, there were no court fees, and the legal costs were minimised.
- The exclusion of costs incurred without pre-approval must be compliant with AmTrust’s duties and the law, otherwise it is not enforceable and the outcome most favourable to the consumer must apply.
- AmTrust refused to tell him the details of the lawyer that assessed his claim.
- AmTrust continued to deny him cover for the contractual dispute on the falsehood that there is no cover until court proceedings have been issued. This is not therefore a dispute about difference of legal opinions but about policy coverage.
- AmTrust failed to even consider his rights to cover to protect his property from potential damage.
- AmTrust should have accepted from February 2021 that he had freedom of choice to appoint his own solicitors and should reimburse the costs he incurred from the date his solicitors confirmed the claim had reasonable prospects.

Mr G also says that AmTrust should pay £2,500 compensation for the trouble caused to him, which includes over 120 hours of time dealing with this matter. In addition, he says that if he had not had to pay legal fees, he would have been able to use the compensation he received from the developer to reduce his mortgagee debt by £14,000. Instead, he had to change his mortgage deal and is now going to have to pay 5% interest on this amount for two years. He will therefore have to pay an additional £1,400 mortgage interest as a result of AmTrust unfairly rejecting his claim.

As the Investigator was unable to resolve the complaint, it was passed to me. I issued a provisional decision on the matter in March 2025. I provisionally determined that the complaint should be upheld. I have set out my provisional findings below:

“This has been a long-running case and Mr G has raised several complaint points. I have only given a brief summary of the main events above and I intend to focus on the main issues. I have considered everything that has been submitted to me by both parties but I will not answer every complaint point raised where I do not consider it impacts the outcome of the complaint.

Policy cover

Mr G’s policy provides cover for legal costs of pursuing a legal claim in relation to various disputes, including in relation to property and contract disputes.

“*Legal claim*” is defined as being “*Preparing work for negotiating or defending your legal rights in a civil court, tribunal or arbitration in the territory, including negotiating a settlement and any hearings.*”

Mr G's policy, like all other legal expenses insurance policies, also requires any legal claim to have a reasonable chance of succeeding in court in order to be covered under the policy. We would consider this to be a 51% or more chance of the legal case succeeding, throughout the life of the case. This is not unfair or unreasonable.

We do not assess the merits of the legal claim, or the conduct of the legal case, that is not within our expertise. Our remit is to assess complaints about regulated activities, such as carrying out an insurance contract. Therefore, in a case such as this, we can only assess whether the insurance claim has been dealt with fairly.

Events in 2020 and 2021

Mr G notified AmTrust of the claim in late 2020. It is normally for a claimant to establish they have a valid claim under an insurance policy, so this would mean Mr G would have to establish the likelihood of success of the legal case. He provided a letter stating he had good claim in November 2020. In December 2020, Mr G went to a different solicitor (who has continued to act for him) and they provided a detailed analysis of the claim, which was also sent to AmTrust in January 2021. Mr G's solicitors said the claim had a 55-60% chance of success. Mr G had therefore provided evidence that established he had a valid claim under the policy.

AmTrust however, wanted to obtain its own assessment of the claim from one of its panel or pre-approved solicitors. Mr G says AmTrust said his solicitors' opinion would be biased. I don't think I need to make any finding about that, as AmTrust was entitled to get its own assessment.

AmTrust obtained a legal assessment from one of its panel solicitors. However, it made clear this was obtained for its own purposes. The panel solicitors advised in February 2021: *"I do not consider the claim has legal prospects of success as the Insured should follow the alternative complaints process, and has likely prejudiced any court claim in any event."*

The policy does not state what will happen if there is a disagreement about the prospects of success of a claim. There is a general arbitration clause, which says that any dispute would be referred to an arbitrator that would be a solicitor or a barrister.

However, in its response to Mr G in 2021, AmTrust said the process was that he *"can submit a legal challenge in the form of a legal assessment from a solicitor of your own choice provided that the solicitor is suitably qualified and has had sight of all available facts and evidence on your claim. They must set out their opinion of the prospects of success in percentage terms with their full reasoning. The cost of this advice will be your responsibility."*

If it is supportive, we will then arrange and pay for a Barrister's Opinion to be obtained. If that also supports, your case we will then be able to accept your claim."

I don't think this is unreasonable in principle. However, in this case, Mr G had already provided a legal assessment of his claim from his own suitably qualified solicitor, which concluded that the claim had reasonable prospects of success.

I do not think the fact this was provided before the panel solicitor's advice makes any difference. It was a well-reasoned, comprehensive assessment of the claim. I don't think it was reasonable to expect Mr G to pay for another assessment to specifically answer points raised by the panel solicitors. However, having said that, I note Mr G's solicitors did respond to the panel solicitor's advice, stating that the panel solicitors had no knowledge of the previous small claims court cases, so could not reasonably conclude any future legal action would be considered to be an abuse of process. I note that the solicitors have also advised while there is case law that a party should not be oppressed by multiples claims that could be dealt with as one, this would not be a risk here as the claims made by Mr G were discrete in nature and some issues arose at different times, so could not all form one claim. They said it is unlikely therefore that the court would consider any further claim an abuse of process.

Given that there were at that time in February 2021, two opinions from, on the face of it, solicitors of equal standing (for the time being I am putting aside Mr G's points about the suitability of the fee earner that assessed the claim on behalf of AmTrust) I consider that AmTrust should have arranged for a barrister to advise. I think that would have been the reasonable step and would have been in line with usual industry practice. I think AmTrust was entitled to get its own solicitor's opinion on the claim but when that was unfavourable, it should have offered a barrister's opinion.

AmTrust says that Mr G did not challenge the rejection of his claim at the time and it has therefore been prejudiced by events that have happened since then.

Mr G chose not to challenge the rejection of his claim in 2021. I can, however, understand why. This was in part because it is clear from Mr G's solicitor's letter of 5 March 2021 that they were under the misapprehension that there would be no cover for the alternative dispute resolution process and therefore they said they would therefore complete that process and then revert back to AmTrust. The letter said: *"I note that you are not prepared to provide cover for this pre-action stage"*. I can see therefore that Mr G was put off complaining about this at the time by the understanding that he did not have cover in any case until proceedings were issued so there would be no cover for the alternative dispute resolution process. AmTrust says it never advised there would be no cover until proceedings were necessary.

However, I think it was not an unreasonable conclusion for Mr G to draw, as the communication around this at the time was not clear. AmTrust's rejection letter said: *"our approved solicitors are of the professional opinion that your claim does not enjoy reasonable prospects of success as they have advised that you should follow the alternative complaints process and prejudice to a Court claim has likely been caused and therefore, we regret to inform you that we are unable to accept your claim on this occasion as it does not satisfy the policy's terms and conditions."*

I can see why this was interpreted as meaning that the alternative dispute resolution process would not be covered.

It seems to me that AmTrust should have clarified the position about cover for alternative dispute resolution processes. As Mr G has said this was about policy coverage, rather than a legal assessment, so was within AmTrust's power to determine.

Given this, I do not consider it fair or reasonable that Mr G be penalised for not challenging AmTrust's refusal of the claim, to the extent that none of his claim is considered, when AmTrust should not have rejected the claim for the reasons it did in February 2021.

I therefore need to now consider what needs to be done to put this right. This means I have to consider what is likely to have happened if AmTrust had not rejected the claim in February 2021.

I cannot be sure what would have happened. However, the opportunity to obtain an independent barrister's opinion to further assess the claim has been lost.

Mr G did progress his claim successfully. Mr G's solicitors have provided further information as to why [they disagreed with] the assessment that he may have been prohibited from further legal claims due to the previous claims made and I have not seen any convincing evidence that their advice on this is incorrect. It seems to me likely therefore that the claim should have been met in February 2021.

AmTrust says the claim had been prejudiced when it was first reported in 2021 and its position has not changed. However, the claim was not rejected in 2021 because AmTrust said its position had been prejudiced. While I acknowledge that the policy excludes cover for costs incurred without its consent, this is not a situation where Mr G incurred costs before claiming under the policy. In this case he submitted a claim that I think was incorrectly refused in February 2021. He did not act unreasonably in pursuing his legal claim and incurring costs in doing so. I do not think it is fair to rely on an exclusion for costs incurred without AmTrust's consent when I think it should have consented to the costs from February 2021.

Having considered everything very carefully, I therefore consider that AmTrust should provide back-dated cover to January 2021 and to include the costs involved in preparing the letter of advice on the claim submitted to AmTrust in January 2021. AmTrust will be entitled to assess any costs incurred for 'reasonableness' in the normal way. But because Mr G had no option but to instruct the solicitors he did and proceed with the matter, I don't think it can now seek to impose any different hourly charging rate on the costs incurred.

I understand there may also be further legal action that Mr G wants to bring. I cannot make any finding on whether that should be covered or not, as it was still being considered when this complaint was submitted to us. But AmTrust should consider the claim for ongoing cover that in line with the remaining policy terms, apart from any terms regarding costs already incurred.

Compensation and other matters

I can see this has been a long and upsetting saga for Mr and Mrs G. They should have had the support of the policy from early 2021 but instead have had the worry of funding the legal action themselves, as well as the worry of adverse costs risks. Mr G has also said they are paying additional mortgage interest as a result of AmTrust's wrongful rejection of the claim.

I agree that some compensation to reflect the impact on Mr and Mrs G is appropriate. However, I have to consider all the circumstances in order to assess the appropriate award. Mr G says AmTrust also failed to take account of their ages and particular vulnerabilities. I have not seen any request that AmTrust make any adjustments for them, or any evidence that would warrant any special award. I also do not consider they were treated unfairly as a result of any particular vulnerability. I do, however, acknowledge that their circumstances have meant this has been particularly stressful for them.

Mr G had the option to challenge AmTrust's position at various stages since 2021. He was professionally represented and while I understand the reasons why he did not challenge AmTrust during this time, it means I cannot reasonably conclude that AmTrust is the primary reason that he incurred those losses or the primary cause of the distress and inconvenience caused to them during this period.

Having taken everything into account and considered the matter very carefully, I consider that the sum of £500, in addition to backdating cover, is appropriate to reflect the impact of incorrectly declining the claim in February 2021."

Responses to my provisional decision

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

AmTrust says it agrees that it should back date cover for Mr G's legal costs in principle but only if they are actually covered by the terms and conditions of the policy. It says that the only form of alternative dispute resolution covered by the policy is arbitration and the dispute resolution service Mr G used was not arbitration but is defined in the warranty insurance as: *"a consensual process whereby the Scheme Administrator may (at its sole discretion) appoint a building surveyor to attempt to resolve a dispute between the developer and policyholder."* And if this is not successful in resolving the complaint, the parties can refer the dispute to arbitration.

AmTrust says the policy covers *"negotiating a settlement and any hearings"* but only in the context of a *"civil court, tribunal or arbitration"* and alternative dispute resolution is a forum for an expert appointed to determine the outcome of a dispute. Therefore, it says there is no cover for the alternative dispute resolution service that Mr G used.

In addition, AmTrust says that the policy does not cover *"any amount which you cannot recover from another insurance policy because an insurer refuses or reduces a claim you have made"* and it appears the warranty insurer paid a settlement to Mr G, so his costs would not be covered for this reason as well.

Mr G has also responded to my provisional decision. He confirms that he accepts my provisional findings provided that there is not an underpayment of the reasonable costs his solicitors incurred. Mr G also says that the legal claim had to be submitted to the developer by the beginning of March 2021, so he had no option to proceed as he did.

Mr G asks that AmTrust be given a deadline for payment of the costs and that interest be added to the total payable. Mr G also asks that his solicitors be paid for the costs of providing the breakdown of legal costs to AmTrust in order to enable the claim settlement to be made to him.

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.

AmTrust previously said that it did not tell Mr G or his solicitors that the alternative dispute resolution process would not be covered under the policy, or that there would be no cover until legal proceedings were issued. It now says that the costs involved in the alternative dispute resolution process it would not be covered, as the policy only covers action in court, tribunal or formal arbitration, or for costs of preparing work for negotiating in the context of proceedings within these forums.

I do not consider it would be fair and reasonable for AmTrust to decline to cover Mr G's costs just because the claim was resolved without the need to issue proceedings. I say this because in the course of preparing a legal claim for court action (or formal arbitration), a solicitor and their client would be expected to explore all options to see if there was a potential avenue for settling the dispute out of court. Indeed, it is a requirement of the Civil Procedure Rules for all such avenues to be exhausted before court proceedings are issued.

If Mr G's solicitors had simply ignored the option to pursue the alternative dispute resolution service available to Mr G, and had simply gone on to issue proceedings regardless, it seems to me that AmTrust would have had to cover their costs, which would likely be much higher than were actually incurred. Mr G should not be penalised for taking the reasonable actions he did to resolve the dispute without the need for formal proceedings. Indeed, this would risk disincentivise any alternative dispute resolution when a claim is funded by a legal expenses policy and would also be contrary to the Civil Procedure Rules.

I therefore consider the work the solicitors did was pre-action work with a view to issuing proceedings and does fall within the policy cover as being part of the preparing work for negotiating Mr G's legal rights in a civil court.

AmTrust also says that the policy does not cover disputes about recovery from other insurers and as the warranty insurer settled Mr G's claim it would fall within this exclusion. This has not been raised before but I do not think is relevant to Mr G's claim. It seems to me the exclusion is reasonably interpreted as being disputes about recovery under other insurance policies in the insured's name, not where another party to the dispute has the benefit of an insurance policy.

Mr G has asked that interest be added to all the costs but I can only reasonably award interest to any part of the costs that he has already paid, as it is intended to reflect the fact he has been without the use of those funds, as he has had to pay costs that should have been settled by AmTrust.

He has also asked that the solicitors be paid for providing AmTrust with the costs information they will need to settle his claim and that their costs are reasonable in terms of the rates they charged and the work they undertook. I set out in my provisional decision that AmTrust has lost the right to object to the hourly rate Mr G's solicitors charged, given he had no choice but to proceed with them. I remain of this opinion. Amtrust will be entitled to have the costs assessed for general reasonableness, which is a common process that his solicitors will be familiar with. I think it is reasonable that this includes any costs that the solicitors would

charge Mr G for preparing their file and information required by AmTrust, again as such costs would not have been incurred by Mr G if AmTrust had accepted the claim in 2021, as I think it should.

Mr G has also asked that AmTrust be given a deadline by which payment of the costs should be made. AmTrust is expected to act on my final decision within a reasonable time of being told Mr and Mrs G accept it. However, the cost assessment process can take some time and I do not consider I can reasonably impose a deadline for this. I do expect AmTrust to act reasonably and interest will be accruing on any costs that Mr G has paid and which are to be reimbursed to him, so it is in AmTrust's interests to settle the matter sooner rather than later.

Finally, neither party has made any comment about the compensation I proposed in my provisional decision, so I see no reason to change this and remain of the opinion that AmTrust should pay Mr G an additional £500 compensation for the distress and inconvenience its handling of the claim has caused.

My final decision

I uphold this complaint against AmTrust Specialty Limited and require it to do the following:

1. Reimburse Mr G's reasonable legal costs incurred from January 2021 (but to also include the cost of preparing the advice submitted to AmTrust in January 2021) to the conclusion of the settlement with the developer, such costs to be assessed for reasonableness in terms of actions taken and time spent but not hourly rate.
2. The costs assessed as being payable by AmTrust that Mr G has already paid should be reimbursed to him, with interest at 8% simple per annum from the date he paid them to the date of reimbursement.
3. Pay Mr and Mrs G the sum of £500 compensation for the distress and inconvenience caused by its wrongful rejection of the claim.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G and Mr G to accept or reject my decision before 28 April 2025.

Harriet McCarthy
Ombudsman