

## **The complaint**

Mr and Mrs S complain that Financial & Legal Insurance Company Ltd has failed to pay their costs following a claim on their legal expenses insurance policy.

## **What happened**

After discovering Japanese knotweed at their property, Mr and Mrs S entered into a conditional fee agreement ("CFA") with solicitors to pursue a legal claim against the person who had sold the property to them. They took out an after the event ("ATE") legal expenses insurance policy to cover them for costs they might have to pay if their claim was unsuccessful.

Proceedings were issued. There was a 'drop hands' offer to settle but Financial & Legal agreed the offer should be rejected. A second offer was made but Financial & Legal wasn't told about this. The solicitors said that was because nothing had changed since the first offer.

Financial & Legal agreed to increase the indemnity limit twice during the proceedings. But shortly before the trial, Financial & Legal said it was withdrawing cover because

- it thought the defence was likely to succeed;
- it hadn't been provided with the solicitors' advice as to why the claim was only against the seller of the property and not the surveyor; and
- it had only just found out about the second offer, and failing to disclose this was a breach of the policy terms.

Financial & Legal said the policy would be cancelled from the outset.

The case proceeded to trial where Mr and Mrs S were not successful. They were ordered to pay the other side's costs.

Mr and Mrs S bought a complaint to this Service about Financial & Legal's decision not to cover the claim and to cancel the policy. Another ombudsman issued a final decision on that complaint. He said Financial & Legal should not have cancelled the policy, and directed it to reinstate the policy and consider the claim in line with the remaining policy terms, as if the policy had not been cancelled.

Mr and Mrs S made a fresh complaint after Financial & Legal said it needed to see the solicitor's file to assess the claim and, because it didn't receive the whole file, wasn't able to do this.

Our investigator said Financial & Legal had had enough time to consider the information provided and deal with it, and it hadn't been able to evidence why the claim had not been accepted. The investigator asked Financial & Legal to pay the claim in line with the policy limits and excess, with interest at 8%, and pay compensation of £500 for the distress and inconvenience caused to Mr and Mrs S.

Financial & Legal didn't accept the investigator's view. It provided further comments, which the investigator considered, and there was further correspondence but no agreement was reached.

Financial & Legal said there had been a misrepresentation by Mr and Mrs S, who had failed to disclose information that should have been provided, and it would have withdrawn cover if it had been told about a negative legal opinion.

The investigator's final view was that there had not been a misrepresentation, but there had at one point been a negative legal opinion which would have entitled Financial & Legal to withdraw cover. So it should not have to pay costs for the period from then until a later date when the legal advice was again positive. She said Financial & Legal should:

- reinstate the policy, if it has been voided;
- pay the claim in line with the policy terms - excluding costs incurred in the period between 14 January 2022 and 21 November 2022 - with interest added; and
- pay £500 compensation for the distress and inconvenience caused.

The investigator said that Financial & Legal should rely on the information provided by Mr S to calculate the amount payable, or alternatively pay a costs draftsman to determine the amount.

Financial & Legal disagrees and has requested an ombudsman's 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 industry rules and guidance say insurers must deal with claims promptly and fairly, support a policyholder to make a claim and not unreasonably reject a claim. They should settle claims promptly once settlement terms are agreed.

There has already been a final decision that the policy should not have been cancelled, it should be reinstated and the claim considered. I'm not revisiting that. The issue for me to determine is whether it's reasonable for Financial & Legal not to pay the claim

Both parties have provided extensive comments. I won't comment in detail on everything that has been raised and will focus on the key points that are relevant to the outcome I've reached. That's in line with our role, which is to provide an independent review, quickly and with minimal formality. I use my judgement to decide what's fair, based on the main crux of a case.

The key points Financial & Legal has made are:

- Its primary position is that the expert's report was tampered with, in response to requests from Mr S and the solicitors. This resulted in a material misrepresentation to the defendants, the court and Financial & Legal. This was a qualifying misrepresentation – as was the failure to disclose that a barrister had declined to act on a conditional fee agreement.
- The application for the ATE policy should have included information about why the first barrister refused to act on a CFA.
- These are sufficient grounds for it to void the policy under Condition 9 of the policy terms (the duty of fair presentation) and/or Condition 10 (fraudulent claims).

- It should have been told when prospects were assessed as falling below 50%. Cover would then have stopped and Mr and Mrs S would have had to withdraw the legal action.
- The indemnity limit was increased to £80,000 in February 2022, at a time when it didn't know the case was not considered to have prospects of success. If it had known, the limit would not have been increased. So if cover is to be provided, it should be limited to £50,000.

Financial & Legal also says it has not received the full solicitors' file, which it needs to assess the claim properly. Mr and Mrs S instructed the solicitors to provide the file, and they in turn provided an online link for Financial & Legal to access the file. Although Financial & Legal says it didn't receive anything, I'm satisfied Mr and Mrs S arranged for the file to be provided and I don't think there is anything else they could reasonably be expected to do.

As I've explained, a final decision was issued by another ombudsman, who said Financial & Legal should not have cancelled the policy, and directed it to reinstate the policy and consider the claim. I'm not reconsidering issues that were determined in the previous complaint.

Financial & Legal has again referred to the settlement offer. As a general rule, whether any offer should be accepted is a matter for the solicitors to advise on. In any event, this was considered by the ombudsman in the previous decision and so it's not something for me to decide.

Financial & Legal has, however, raised a new issue after considering the solicitor's file – it says evidence was tampered with, and this amounts to a misrepresentation.

Financial & Legal has referred to condition 9 of the policy, which refers to the duty of fair presentation. As Mr and Mrs S are consumers, that would not apply to them. The relevant law relating to consumers is the Insurance (Disclosure and Representations) Act 2012.

The position in relation to misrepresentation was explained in the previous ombudsman's decision – for there to be a qualifying misrepresentation, Financial & Legal would need to show Mr and Mrs S were asked a clear question, they failed to take reasonable care when answering the question and provided information that was inaccurate. As the previous ombudsman noted, they were not asked any question when they bought the policy.

Financial & Legal says that doesn't matter, since,

*"We consider the tampering with... Expert Report to be very very different. As tampering with an experts report is not permitted we could not have been expected to ask a question whether... report had been tampered with."*

I appreciate it may not have had a reason to ask specifically about this. Nevertheless, Financial & Legal could have asked questions about what evidence was being relied on and what legal advice had been provided. Mr and Mrs S would have been required to answer these questions and if they had done so, this would likely have provided Financial & legal with information about the expert report.

"Tampering with" evidence suggests Mr and Mrs S wrongly interfered with or altered evidence. The solicitors and expert have explained what happened with the report, where changes were made by agreement with the expert. If the solicitors and the expert were satisfied it was appropriate to proceed on that basis, it wouldn't be reasonable to expect Mr and Mrs S to think this was something they needed to bring to Financial & Legal's attention.

Mr S says he co-operated with and followed the solicitor's advice – in accordance with the requirements of the policy. If they were not asked questions, Mr and Mrs S were not obliged to think about what information Financial & Legal might have wanted to see and be proactive in providing that. On this basis, I don't consider there was a misrepresentation, or that Mr and Mrs S' actions were fraudulent.

There are two other key points Financial & Legal relies on – that it should have been told a barrister had declined to act on a conditional fee agreement, and should have been told when prospects were assessed as falling below 50%.

On the first point, Financial & Legal says the application for the policy was done by completing a form which specifically asked whether counsel was willing to work on a CFA and, as the initial barrister had declined to do so, it should have been told about this. Again, Financial & Legal says the failure to provide this information was a misrepresentation.

In response to this, Mr and Mrs S' solicitor has explained that the form didn't ask how many barristers had been approached to take on the case or if the case has been refused by any previous counsel. Although one barrister declined, they soon found another who was happy to take the case on. They say there are many reasons why counsel might not wish to take a case on a CFA. When the application form was signed, there was a barrister willing to take on the case on a CFA basis. So the form was accurate.

For these reasons, I don't consider Financial & Legal has shown any reason why cover would not (or should not) have been provided.

With regard to the legal advice on prospects, it's a requirement of the policy that the case has prospects of success for cover to be provided. At one point (in January 2022) counsel's advice was that they doubted whether the case was likely to succeed. If Financial & Legal had been told about that, it could reasonably have withdrawn cover. But in November 2022, the advice was that the case did have reasonable prospects. So Mr and Mrs S would have been entitled to cover from then on.

The indemnity limit was increased during the period when Financial & Legal could have withdrawn cover. When it was requested, Financial & Legal had the opportunity to ask questions about the claim before deciding whether to agree to the request. This might have included, for example, what the legal advice was at that point or whether any offers had been made. Financial & Legal agreed to the increase with few questions asked.

In addition, if this had been requested later on (when the legal advice was favourable) there's no reason to think it would not have been agreed.

For these reasons, I don't think it would be reasonable not to pay the claim.

Financial & Legal has said it wasn't possible to determine the costs for the relevant period, but Mr S has given details of the costs. The total costs to be paid are well above the indemnity limit of £80,000. Financial & Legal did make an interim payment of £7,736.60. It's reasonable to deduct that amount. So it should either pay the balance of £72,263.40 or instruct a costs assessor to determine the amount to be paid.

For clarity, if a costs assessor is instructed, their role would only be to determine the amounts to be paid – not whether costs should be paid at all.

Having the claim declined was extremely upsetting for Mr and Mrs S, at a time when they were already under pressure, having lost the case and been ordered to pay substantial costs. Financial & Legal should acknowledge the additional distress caused with a payment

of compensation and I think the sum of £500 is fair.

### **Putting things right**

To put things right, Financial & Legal Insurance Company Ltd needs to:

- Pay the claim in line with the policy terms excluding costs incurred in the period between 14 January 2022 and 21 November 2022.  
To calculate the amount payable Financial & Legal should rely on the information provided by Mr S and pay the sum of £72,263.40 or alternatively pay a costs draftsman to determine the amounts payable under the policy.
- Pay interest on the costs payment from the date the payment should have been made at the conclusion of the case, until the date the payment is made at 8% a year simple.\*
- Pay £500 compensation for the distress and inconvenience caused.

\* If Financial & Legal Insurance Company Ltd considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr and Mrs S how much it's taken off. It should also give Mr and Mrs S a tax deduction certificate if they ask for one, so they can reclaim the tax from HM Revenue & Customs if appropriate.

### **My final decision**

I uphold the complaint and direct Financial & Legal Insurance Company Ltd to pay the compensation set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs S to accept or reject my decision before 21 May 2025.

Peter Whiteley  
**Ombudsman**