

complaint

Mr D complains about Elite Insurance Company Limited's decision to decline his legal expenses claim.

All references to Elite include its claims handlers.

background

I issued a provisional decision on this complaint and an extract from that decision follows:

Mr D suffered hearing loss in the course of his employment. He instructed solicitors to make a claim on his behalf against his employers. Elite provided after the event legal expenses cover.

The solicitors said that the prospects of success were between 51%-54%. Court proceedings were started in March 2013 and Elite said it would consider indemnity after it saw the court documents.

When the solicitors provided the documents, Elite found inconsistencies between what was said in early correspondence to the other side and Mr D's statement, and what was in Mr D's medical report. Elite decided to withdraw funding as its policy didn't cover claims where inaccurate information was provided. It also said that it didn't cover dishonest claims and claims where policy holders had behaved unreasonably or negligently. The policy terms say Elite may stop funding a case if the policyholder knowingly gives false information.

The solicitors didn't agree with Elite's decision. They said that Mr D's original instructions were consistent with the medical report. If there were any inconsistencies, they were due to them misunderstanding his evidence. The solicitors provided a copy of the original vetting form in support of this. The solicitors also said that they still felt that Mr D had a reasonable case.

Elite didn't change its view and said that by signing his statement Mr D confirmed that the contents were true. Elite felt that Mr D's credibility would come to question.

In October 2013 Elite said it would consider cover if it was provided with the defendant's response to the claim. The solicitors provided further documents and chased for a decision regarding cover. Elite didn't confirm cover so the solicitors complained to Elite.

In reply, Elite said it wouldn't cover Mr D's costs because:

- *Mr D gave misleading evidence in his witness statement, which included a statement of truth;*
- *The witness statement contradicted the medical report;*
- *Mr D shouldn't have signed the witness statement if it wasn't correct;*
- *It didn't feel that the discrepancies were due to the solicitor misunderstanding things; Mr D amended his statement to match the medical report.*

In his complaint to us Mr D asked for funding to be reinstated. He said Elite's decision had been unreasonable. Mr D's solicitors said that he never knowingly gave misleading information, the error was corrected and the witness statement was amended before it was

sent to the other side. Finally they said that the chances of success are even better with the correct version of events.

Our adjudicator felt that Elite had acted reasonably in rejecting the claim based on the fact that Mr D had breached his policy by providing misleading information. She didn't think Mr D acted with utmost good faith. So she didn't uphold the complaint.

Mr D's solicitors say:

- Mr D's initial instructions were consistent with the medical report. This was also supported by the contents of the form they sent to Elite in October 2012. They have provided a copy of this form.*
- The defendant hasn't taken issue with the fact that the initial correspondence contradicts the medical report and now the witness statement.*
- Mr D's case is now stronger. Mr D wouldn't knowingly sign a statement that contains inaccurate information which made his case weaker.*
- As Elite's agents, they were aware of the right facts from the start; as they act on delegated authority this means that Elite was aware of this information too.*
- They still feel that the case has good chances of winning.*

The adjudicator didn't change her mind and the case was referred to an ombudsman.

my provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

Elite declined the claim because it said Mr D breached the policy terms by giving misleading information. It may cancel the policy if the policy holder gives false or misleading information.

Mr D's solicitors have said that the inconsistencies in the draft witness statement and the letter of claim were down to them. They say Mr D gave them accurate information from the start and this information matched what was in the medical evidence – that's why the medical report didn't have to be amended. They simply amended the draft witness statement before sending it to the other side, and explained in correspondence why there was an inconsistency in the letter of claim.

Mr D's solicitors have sent a copy of the form with Mr D's initial instructions. This information is consistent with the medical report. They also provided a copy of the form they sent to Elite when they took the case on, which has the same information. The solicitors say any discrepancies in the documents are down to their own error. Mr D has never tried to mislead them or provide false information.

I have to decide on balance whether Mr D knowingly provided false information which would give Elite the right to cancel his insurance. Having considered all the circumstances, I don't think Mr D deliberately gave misleading information. The vetting form includes the contents of a telephone conversation between Mr D and the solicitors. This is a note made at the time of his earliest account, which supports what the solicitors are saying. Other documents have the same information. I think that any inconsistencies were down to the solicitors' error rather than as a result of Mr D giving false information. Elite wasn't acting reasonably when it withdrew cover.

Having considered all the circumstances of the case, I believe an award in our “substantial” band for trouble and upset is appropriate. Mr D hasn’t had cover for his legal costs since September 2013. He’s currently in the middle of court proceedings and has to comply with court directions. And his solicitors are considering whether they can carry on with the case due to lack of funding. So not only are his costs not being covered, he also has to face the possibility that he might have to drop his claim. If proceedings have already been discontinued I will consider putting Mr D in the position he would’ve been in had funding never been declined in my final decision.

my provisional decision

For the reasons stated above I have decided that Mr D’s complaint against Elite Insurance Company Limited should be upheld. I’m not aware of any other reasons as to why cover shouldn’t be provided and, therefore, Elite should resume Mr D’s cover. I also award Mr D £500.00 for distress and inconvenience.

developments since my provisional decision

Elite responded to my decision a few days after the deadline and made the following points:

- That Mr D is at fault for signing a statement of truth on a formal court document which was clearly not true.
- That responsibility should be with Mr D’s solicitors who said that this was their mistake. This shouldn’t be swept under the carpet.
- That it believes that the case will not be successful and shouldn’t be compelled to fund a claim that it believes will fail. Our service shouldn’t be simply relying on Mr D’s solicitor’s assessment of the chances of the case succeeding.
- It has the right to refuse funding under the terms of the policy if it believes that a claim won’t be successful even if Mr D or his solicitors disagree.

I asked Elite whether it had any advice from either a solicitor or a barrister in support of its statement that Mr D’s case has no merits. If not, I asked for the reasoning behind its view that Mr D’s claim will not succeed.

Elite has sent me two court cases to consider and responded to say the following:

- That a contract of insurance is a “contract of utmost good faith” and that Mr D failed to disclose what Elite considers “material” facts that would help its underwriters assess the risks involved.
- That Mr D signed his witness statement which had a statement of truth and that he must’ve read it before signing it. A false statement of truth amounts to contempt of court. Insurers are entitled to void a policy for exaggeration or dishonesty.
- That Mr D’s solicitor’s statement that it was their fault that the witness statement was incorrect doesn’t help Mr D. This, Elite says, is because he signed the statement of truth and this wouldn’t make the statement void.
- That it would be unfair to be made to cover a claim where the policy holder has provided false information.
- That Mr D’s claim allegations were that he wasn’t provided with safety equipment but he has in fact conceded that this was provided. This means that the basis of deciding whether the claim had good chances of succeeding was wrong. For that reason Elite says that the case has no merits.

Mr D and his solicitors made no comments further to my provisional decision.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've considered the arguments put forward by Elite. For reasons I've already explained in my provisional decision I don't think that, on balance, that Mr D knowingly provided false information. For the same reasons I don't think that Mr D failed to "act in the utmost good faith" or that he knowingly hid a "material" fact from Elite. Having seen the vetting form and the original referral form from the solicitors to Elite I accept Mr D's solicitors' argument that the mistake in the witness statement is down to them. For those reasons I don't think that Elite should be allowed to withhold cover on that basis.

Elite has said that the fact that Mr D signed the statement of truth in his witness statement means that he must've read it and is therefore in contempt of court for making a statement he knows wasn't true. Mr D's solicitors have said that Elite is referring to a statement which was changed before it was given to the other side. Therefore apparently the only document which contains inaccurate information was the letter of claim. Neither party has said that that document contained a statement of truth. For that reason, as the statement was allegedly never seen by the other side or in fact the court I don't see how Mr D could be in contempt of court.

I've considered the case law I've been sent by Elite. I am required to take the law into account when making a decision and deciding what is fair and reasonable overall. This means that I am not required to follow the law if this means that my decision would be unfair or unreasonable. In the first case, the court decided that where a full statement of truth was missing from a court document, this didn't make the document void as it was merely an irregularity. Elite says that Mr D's statement isn't void because it was signed by a statement of truth. This in turn makes him in contempt of court. As I have said above, Mr D's solicitors said that that particular statement was never sent to the other side. If a statement was never disclosed, I don't see how it could bring the person who signed it in contempt of court. As far as I understand the court isn't aware of this statement's existence.

The second case is a contempt of court case where the defendant admitted to lying in a witness statement and an affidavit both of which were signed with a statement of truth. These documents were prepared further to a court order and had been sent to the claimants and I assume also to the court. In that case the person who made the false statement later admitted that it was false and that he knowingly made a false statement. The court said that contempt of court proceedings may be brought if someone makes a false statement signed by a statement of truth without believing it was true. I think this case is very different from Mr D's. As I have explained above I don't believe that Mr D knowingly made a false statement and that the discrepancy in his witness statement was down to his solicitors. The solicitors have sent documents that in my view prove that Mr D's version of what happened didn't change throughout the claim. Mr D's mistake seems to be that he didn't read the statement prepared by his solicitor carefully enough before signing it. I think it would be unfair to penalise him for that.

I take Elite's point that it shouldn't be forced to fund a claim which it believes is going to fail. We often come across legal expenses policies which contain a term that a case must have good chances of succeeding for it to be funded by the insurer. We don't think that these

terms are unreasonable and don't believe that insurers should have to fund claims that aren't likely to be successful. Our general approach is that in order to determine whether a case has good chances of success, an insurer should get the advice of a solicitor or preferably a barrister.

I asked Elite why it believes the case has no merits and I explained our general approach. Up to that point the only legal opinion I had seen was that of Mr D's own solicitors who felt that the chances of success are good. The reply I received from Elite was prepared by a solicitor. He doesn't believe that the case has good chances of succeeding because Mr D has now accepted that he was given protective equipment. But in the same letter Elite says that Mr D's statement said that he was wearing protective equipment but his medical report said he wasn't. Mr D has said that the witness statement was incorrect so his version is that he wasn't provided with protective equipment at all. Mr D has said that this has been his version all along, as shown in the vetting form. One of Mr D's solicitors' arguments was that being given no equipment helps his case more than if he had been given the wrong equipment, which was what was mistakenly written in Mr D's statement. I can see that this is a reasoned argument. Also Elite's statement that Mr D now accepts that he was given equipment is incorrect. Therefore its basis of assessing the merits of the case seems wrong.

my final decision

For the reasons stated above I've decided to uphold Mr D's complaint against Elite Insurance Company Limited.

Elite should re assess the claim and consider resuming funding in line with the remaining terms of the policy. Elite can't rely on the reasons it has relied on so far which are that Mr D gave false information and that the case doesn't have good prospects of success. I don't think those are valid reasons and Elite hasn't sent me a reasoned legal advice in support of its view that the case doesn't have good prospects of success.

I also award Mr D £500.00 for distress and inconvenience.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr D to accept or reject my decision 9 November 2015.

Anastasia Serdari
ombudsman