

complaint

Mr and Mrs D complain about the handling of their legal expenses claim by Society of Lloyd's. They are unhappy that they were not able to pursue their case and were not given any other options.

background

I issued a Provisional Decision on this complaint in November 2014, an extract from which is set out below:

In 2000 Mr and Mrs D bought a property using a firm of solicitors to deal with the conveyancing (the conveyancing solicitors). When they decided to sell the property in 2007 and move to a different part of the country, it became apparent that there were covenants in place that affected their property. A restriction had been added to their title documents by the Land Registry which required the consent of the owner of the neighbouring property to any sale. A prospective purchaser who had made an offer to buy the property withdrew from the purchase just before exchange of contracts was due to take place. One of the reasons given was the existence of the restriction.

Mr and Mrs D put the property back on the market for sale. They had a home insurance policy which included legal expenses cover and they sought cover to make a negligence claim against the conveyancing solicitors. Society of Lloyds appointed panel solicitors (the panel solicitors) to consider the issue. They advised that the priority was to ensure that the position with the property title was regularised so that similar problems did not recur when a sale was agreed.

Ultimately, the restriction on the property title was removed when Mr and Mrs D's home insurer agreed a settlement amount with their neighbours to release the restriction, correct the title and pay the legal costs. The property was eventually sold in late 2012 but for a lower price than it was marketed for in 2007. As a result, Mr and Mrs D had to take out a mortgage to buy their new property.

The panel solicitors had obtained two counsel's opinions in 2009 on the prospects of success of the professional negligence claim against the conveyancing solicitors (in accordance with the requirement in the policy for a claim to have reasonable prospects of success). The first barrister was initially of the view that the case could succeed but he required further information in order to consider matters further. Another opinion was obtained from a second barrister who advised that a claim for professional negligence could not be supported. Society of Lloyds withdrew funding for the claim but as a gesture of goodwill, in order to attempt settlement of Mr and Mrs D's claim, agreed to fund a letter of claim to be sent to the conveyancing solicitors. The panel solicitors sent a letter but it was not acknowledged and Society of Lloyd's said that it would not provide any further funding.

Mr and Mrs D referred their complaint to this service for an impartial assessment.

Our adjudicator considered the complaint and did not uphold it. She said Society of Lloyd's had obtained opinions on the prospects of success from three barristers who all expressed concerns about the prospects of the claim succeeding. She considered its actions were fair and reasonable. An insurer could not be expected to fund a claim where three barristers had advised it was unlikely to succeed. (In fact, as I shall explain later, only two barristers had advised on this claim; the third gave advice on a different claim.)

The adjudicator also said another requirement of funding was that the claim had to be proportionate to pursue. In other words, the value of the claim had to exceed the legal costs that would be incurred in order to pursue it. The barristers' comments and the panel solicitors' calculations of the claim had concluded that it was not proportionate to pursue. She was unable to consider Mr and Mrs D's complaints about the panel solicitors and their delays in progressing her case because this service does not have any jurisdiction to consider solicitors' actions. Overall, despite her sympathy for their position, she did not consider the actions of the insurer incorrect because funding for a claim could only be provided where it satisfied the terms and conditions of the policy. She said that if Mr and Mrs D could provide a legal opinion which supported their claim, Society of Lloyd's would review their claim.

Mr and Mrs D disagreed with the adjudicator's conclusion. They made the following points:

- The panel solicitors took ten months from their first instruction to obtain a barrister's opinion on their potential claim. The first barrister stated in his second opinion in February 2009 that he needed further information before he could make informed assessments of quantum under a number of the heads which had been identified, but as things presently stood the claim was likely to be worth in the region of £62,000. They do not understand why funding did not continue for their claim. The barrister had identified that the full amount of their claim could not be evaluated correctly until they had sold their property and bought a smaller property, but he had already valued the claim at £62,000.*
- The panel solicitors had told them what they could claim for and they had prepared a spreadsheet of their losses. Due to the delay in selling their house, their losses had increased to £250,000. Their estate agents had recommended that the sale price was reduced because the property had been on the market for so long but a much smaller house next door sold in January 2012 for £500,000. They query whether this means that their house would have been worth more.*
- The conveyancing solicitors' insurers had told them that a case like theirs had gone to court and the claimant had been awarded the loss in value of their property and compensation. Their loss in value was £110,000 and would have paid off their outstanding mortgage.*
- They query why the panel solicitors did not contact the regulator and find out who was the insurer of the conveyancing solicitors and make an attempt to deal with them directly.*

- *They have lost trust and faith in the legal profession. The money invested in the property was left to Mrs D by her father and was compensation he had been awarded.*

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.

The starting point is the policy. The General Conditions provided that:

"2 If at any time we consider that:

(a) You do not have a reasonable prospect of success in the legal proceedings, we will write to you giving you reasons and we will not be liable to pay any further legal expenses for the claim.

In order to assess the prospects of success of Mr and Mrs D's claim for negligence against the conveyancing solicitors, the panel solicitors sought advice from a barrister.

I have noted that the first barrister's opinion obtained in 2008 was generally positive. The barrister said he was: "firmly of the view that [the conveyancing solicitors] were negligent in failing to alert [Mr and Mrs D] to the restriction and the potential for problems in the future which it entailed." He went on to say that in order to justify bringing proceedings, it was necessary to show that substantive loss had been caused by their negligence. A claim for breach of contract was time barred under the Limitation Act 1980 but the same limitation problem did not affect the claim based in tort and the three year limitation period for claims in negligence would only have begun to run once Mr and Mrs D had the requisite knowledge relating to their claim. On the basis of the available information, it could not have been before some time in 2007, so there was still well over a year before the limitation period expired.

The first barrister said the additional costs incurred by Mr and Mrs D in 2007 to get the restriction changed were recoverable. He considered their estimate of losses resulting from the sale falling through because of the unusual restriction on the register but required more information about some of the losses which had been claimed, such as savings. He also suggested two further heads of damage.

The first barrister gave a second opinion on the claim a few months later, having been provided with more information about Mr and Mrs D's losses. He said the drop in value of the property over the period while Mr and Mrs D had been forced to remain there would be recoverable. But they would have to give credit for the saving which would have been made on a new house being bought at a lower price than would have been the case if it had been purchased in 2007. It would not be possible to put a final value on it until their existing home was sold. On the present information the loss might be fairly substantial, in the region of £50,000 to £75,000, but for the moment he would be more conservative and anticipate a claim in the region of £25,000. He concluded that some of the heads of loss would only be capable of final quantification once the move to a less expensive house had taken place but "as things presently stand, the ... claim is likely to be worth in the region of £62,000".

For reasons which are not clear, the panel solicitors then obtained an opinion from a second barrister. He did not consider an allegation that the conveyancing solicitors

were negligent not to give specific advice about the covenants on the property title would succeed. He also did not consider it was reasonably foreseeable by a reasonably competent conveyancing solicitor that there might be difficulties in securing compliance with the restriction on a sale of the property. He said the use of a restriction to ensure the enforceability of positive covenants was normal conveyancing practice and it was difficult to see what specific warning or advice the conveyancing solicitors should have given. In addition, the covenants were normal. Details had been sent to Mr and Mrs D and by signing a deed in September 2000, they agreed to abide by them. On balance, he thought the conveyancing solicitors had done enough to bring the existence of the covenants to Mr and Mrs D's attention. The restriction itself was not so unusual as to require any special mention. There was no material on which to base a warning that the neighbours or their successors would prove to be difficult. On the issue of quantum, he was concerned that most of the losses claimed would be considered to be too remote in law.

The second barrister's opinion was provided to the first barrister and he was asked to give his reasons for preferring his conclusion on the issue of liability. He remained of the view that Mr and Mrs D had a good case on liability and said the reasons given by the second barrister for saying the conveyancing solicitors were not negligent were not valid.

He said whether or not the restriction was out of the ordinary was not decisive of the question of whether there was a duty on the conveyancing solicitors to draw it to the attention of Mr and Mrs D and/or to advise them of the potential implications. He could not see any reason why a duty could not arise in relation to the restriction even if it was not out of the ordinary. He also considered it unusual to have a restriction on the register which on its face, gave the owner of a neighbouring property an apparently unfettered right to prevent the registration of any disposition.

He was also satisfied no reasonably competent conveyancing solicitor would have failed to draw the wording and potential effect of the restriction to Mr and Mrs D's attention. Overall, he concluded that whether Mr and Mrs D could satisfy a judge that things would have turned out differently so as to enable them to say that they had suffered substantive damage would depend on the evidence at trial. He did not see any good reason for dismissing their instructions to the effect that they would not have proceeded with the purchase on the same terms. The starting point was that it would be a far from irrational decision to withdraw from the purchase of the property on having their attention drawn to the restrictions and being properly informed as to its implications.

Following a conversation between Society of Lloyd's and the panel solicitors, Mr and Mrs D were informed that funding had been withdrawn for their claim on the basis of three barristers' advices that the prospects of success of the claim were no more than 50%.

Taking into account the first barrister's positive comments set out above, I do not agree this was a correct summary of the barristers' views or that it was appropriate for Society of Lloyd's to withdraw funding for the claim. In 2011 Society of Lloyd's obtained the advice of a third barrister on Mr and Mrs D's potential claim against the solicitors who had acted for them in 2007 on the sale of their property which fell through. However, the third barrister's advice was not on the prospects of success of a claim against the conveyancing solicitors. It was not correct for Society of Lloyd's to say that it had relied on three unsupportive barrister's opinions on Mr and Mrs D's claim against the conveyancing solicitors. In fact one barrister was supportive, one was unsupportive and one was advising on a different claim altogether.

Before seeking an opinion from a second barrister, Society of Lloyds had an opinion from the first barrister that there was a good claim, likely to recover damages of around £62,000 or possibly more. The only issue was to obtain more information from Mr and Mrs D to quantify their losses before proceeding with the claim. As I have said, it's not clear why, rather than doing that, it decided to seek a second opinion.

Taking into account all the circumstances, and the fact that Mr and Mrs D's claim against the conveyancing solicitors for negligence is now likely to be statute barred, I consider it appropriate for Society of Lloyd's to obtain a final advice from the first barrister on the value of their claim (taking into account any further information that he requires from Mr and Mrs D on the losses they have claimed) and then pay them the value of the claim, in full and final settlement of their complaint.

my provisional decision

For the reasons set out above, it is my provisional decision that this complaint is upheld. Society of Lloyd's should obtain a final advice from the first barrister on the value of Mr and Mrs D's claim against the conveyancing solicitors, and then pay them the value of the claim, in full and final settlement of their complaint.

developments

Mr and Mrs D responded to my decision and accepted it. They provided details of their losses which they considered should be reimbursed by Society of Lloyd's.

Society of Lloyd's did not agree with my Provisional Decision. It made the following points:

- Whilst there may have been differing opinions on the merits of Mr and Mrs D's claim against the solicitors, the fundamental issue was quantum and in particular, the costs/benefit ratio. Faced with a barrister's opinion that was positive on liability, the underwriters were asked to consider funding the case despite counsel placing the value at in the region of £62,000, and the estimate of costs at that stage was £50,000 plus VAT, including disbursements. This meant that the costs/benefit ratio was very finely balanced.
- Given that it was necessary for a matter to be proportionate in order to be covered under the policy, and in view of the potential adverse costs to the underwriters if the claim was not successful, obtaining a second opinion was justified. It was apparent from the second barrister's advice that he was asked to consider both liability and quantum and he found that the case was lacking on both counts. In addition, it was

not only the underwriters who had concerns about the value of the claim. Mr and Mrs D had also instructed it to ask the underwriters for funding to obtain counsel's further opinion on the value of the claim (for different reasons). As a result, it was not unreasonable to obtain the further advice, and it was not contrary to any other underwriter's approach.

- It should also be noted that the policy terms make it clear that funding is not available to investigate the merits of a claim, but despite this the underwriters agreed to provide further funding to do just that. The fact that the second advice was negative only served to highlight the problems with liability and how difficult it was to say that the claim had prospects of success of more than 50%.
- The concerns with regard to proportionality following receipt of the first barrister's second advice were legitimate and sufficient to warrant funding being declined. The subsequent developments in relation to proving liability compounded the issue.

my findings

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

Society of Lloyd's has made the point that the costs:benefit ratio of Mr and Mrs D's claim against the conveyancing solicitors was very finely balanced, according to the value placed on the claim by the first barrister. As a result, it considers that it was justified in obtaining a second counsel's opinion to check that the claim was proportionate to pursue and that was not, in itself, unreasonable or contrary to any other underwriter's approach. In addition, it says the concerns about proportionality following receipt of the first barrister's second advice were enough to warrant funding being refused.

I agree that in legal expenses insurance, the requirement for a claim to be proportionate to pursue is common. The policy made reference to this requirement in the definition of 'legal expenses' which was "*your professional adviser's reasonable, proportionate and unrecovered legal fees, costs and disbursements which we have agreed.*" In addition, the cover under the policy for the insured events was subject to the "*reasonableness and proportionality tests*" being satisfied.

Society of Lloyd's has raised the issue of proportionality, but I cannot see that in the correspondence with Mr and Mrs D at the time it referred to this or gave it as the main reason for declining cover – the reason given at the time was that prospects were no more than 50%. The final response letter also stated that the policy would only fund legal proceedings where there were deemed to be reasonable prospects of success. It referred to taking three independent legal opinions, two of which were from barristers, and said that "none provided an opinion that the case could be successful in court".

That statement was not accurate. I had already stated in my Provisional Decision that taking into account the positive comments in the first barrister's initial advice, Society of Lloyd's did not provide Mr and Mrs D with a correct summary of the barrister's views, and it was not appropriate to withdraw funding for the claim. The third barrister had been instructed to consider the prospects of a different claim.

In addition, the first barrister had stated in his opinion that on the present information, the loss could be fairly substantial. The claim for drop in house value alone might be in the region of £50,000 to £75,000. As things stood he would estimate the value at £62,000 but he had not calculated all the possible losses; some of the heads of loss would only be capable of final quantification once the move to a less expensive house had taken place. This indicates the final total might be considerably more.

When he was provided with the unsupportive opinion of the second barrister, he remained of the view that Mr and Mrs D had a good case on liability and did not consider the second barrister's reasons for the considering the claim would not succeed were valid.

In those circumstances, I remain of the opinion that it was not appropriate for Society of Lloyd's to withdraw funding for Mr and Mrs D's claim.

I have not been provided with a copy of the instructions to the second barrister to see whether he was specifically instructed to advise on the proportionality of the claim. I have noted that in its submissions to this service, Society of Lloyd's said the second barrister's opinion was obtained following Mr and Mrs D's complaint.

my final decision

For the reasons set out above, it is my final decision that this complaint is upheld. Society of Lloyd's should obtain a final advice from the first barrister on the value of Mr and Mrs D's claim against the conveyancing solicitors, and then pay them the value of the claim, in full and final settlement of the complaint.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr and Mrs D to accept or reject my decision before 23 February 2015.

Peter Whiteley
ombudsman