

complaint

Mr and Mrs S's complaint is about the indemnity provided by Society of Lloyd's in relation to paying their solicitor's costs of acting in their legal claim.

background

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

"In late 2004 and early 2005, Mr and Mrs S were in dispute with their neighbours about the boundary between their properties. They notified Society of Lloyd's of the dispute and were told that a claim would only be covered if court proceedings were imminent. They instructed solicitors who sent a letter of claim to their neighbours but the matter was not resolved and they were advised in 2006 that court proceedings were necessary. Mr and Mrs S requested funding again for their claim from Society of Lloyd's.

Society of Lloyd's instructed its panel solicitors in early 2007 to handle the dispute. They corresponded with the neighbours for some time but no real progress was made. In late 2009 the panel solicitors advised Society of Lloyd's that they did not believe that the claim had prospects of success of 51% or more (a requirement of funding under the policy). Society of Lloyd's informed Mr and Mrs S that as a result, it would no longer be able to fund any further work by the solicitors.

Mr and Mrs S instructed new solicitors. They informed Society of Lloyd's in March 2010 that they considered that Mr and Mrs S' claim for an injunction to remove a construction encroaching on their land, as well as other matters did have prospects of success of 51% or more.

Society of Lloyd's did not agree at that stage to reinstate cover but asked for further evidence as to why an injunction was being sought so long after the original incident. The solicitors provided further evidence, including a surveyor's report which supported the claim in respect of the location of the boundary. It also provided copies of further witness statements and details of supportive case law.

In June 2010 Society of Lloyd's said that in view of the disagreement, counsel's advice should be obtained on the application for an injunction and if it was supportive, the cost would be covered. The solicitors provided a counsel's advice note which had been obtained in 2006, which supported Mr and Mrs S' position.

Society of Lloyd's at that stage said that it was not willing to grant cover for the claim because it said that the prospects depended entirely on whose version of events was believed, but the further enquiries suggested by counsel should be carried out. The solicitors explained that the enquiries had already been carried out and the evidence obtained and provided. Society of Lloyd's suggested that an updated counsel's advice should be obtained and if it was favourable, the costs would be covered.

In August 2010 Mr and Mrs S's solicitors provided further counsel's advice which confirmed that the claim for an injunction had prospects of success of 55% to 60%. Society of Lloyd's finally agreed to cover the claim and sent out its terms of appointment for non-panel solicitors to be signed and returned in order for indemnity

to be put in place. However, those terms included a condition that the hourly rate of £125 plus VAT, which is less than the solicitors would agree to act for. As Society of Lloyd's was not willing to increase the hourly rate, the solicitors returned a signed copy of the terms of appointment in late September 2010 in order to be able to proceed with the case, maintaining their objection to the hourly rate.

The court proceedings which had been issued in April 2010 were settled in late 2011 by a consent order agreeing the location of the boundary and works and providing for registration of the order against both property titles.

Mr and Mrs S's solicitors submitted details of their costs to Society of Lloyd's for payment. A costs draftsman was instructed to consider the costs and made an offer to settle them based on indemnity being granted on the date of receipt of the signed terms at the end of September 2010, and an hourly charging rate of £125.

Mr and Mrs S are unhappy with this. They say:

- Indemnity should be provided from seven days of receiving their solicitors' letter of March 2010 which set out their view that the claim had reasonable prospects of success. In the alternative it should be on receipt of the further evidence requested by Lloyd's or at the very latest, the updated counsel's advice in August 2010.*
- It had taken seven months for Lloyd's to make an offer in relation to any of the costs, which is unreasonable.*
- Lloyd's should also pay the costs of their solicitor in pursuing the claim for costs and this complaint (which they put at around £2,300 plus VAT).*

Our adjudicator considered the complaint and concluded that cover for the claim should be backdated to March 2010 when the solicitors wrote to Society of Lloyd's, because counsel had confirmed that their opinion was correct. She also said that once the court proceedings had been issued in April 2010, Society of Lloyd's should have agreed an hourly rate in line with the local county court guideline rate. The policy had provided cover on a standard basis and did not restrict the hourly rate to £125.

Society of Lloyd's did not agree with the adjudicator's conclusion and requested a review. It says:

- The claim had been with the panel solicitors for three years before they confirmed to Mr and Mrs S that the prospects of success were not sufficient to enable indemnity to continue. Cover had been withdrawn for the claim on the panel solicitors' informed decision. It was not the case that it had refused to grant cover for the claim in the first place.*
- Mr and Mrs S' solicitors had requested indemnity for an injunction and it made legitimate further enquiries and their response was passed to another panel solicitor for a further opinion. The panel solicitor reported that the court's decision to grant an injunction would depend on the financial impact of the trespass. Further information about the financial impact was requested from Mr and Mrs S' solicitors in June 2010 but the response received was vague and counsel's opinion was requested. His opinion was that the claim had good prospects if their version of events was believed but not if the other party's version of events was believed. It was not possible in the meantime to*

determine who would be correct and further enquiries by counsel were suggested. The second counsel was of the opinion that the claim had prospects of 55% to 60% and it agreed to cover the claim. Its concerns about the delay before seeking an injunction and the further information required were all good reasons for not agreeing cover at that stage.

- *It was entitled to apply an hourly rate equivalent to that applied to panel solicitors before and after the issue of proceedings.*

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.

date of indemnity

The policy that Mr and Mrs S took out provided the following:

"We will pay Costs and Expenses to a maximum of £30,000 for any of the following insured incidents, in order to pursue a civil claim directly arising from one or more of the following events or causes, occurring within the United Kingdom...if we deem that there are good prospects of success."

It was a requirement of funding under the policy that a claim was deemed to have good prospects of success. This requirement is common to all legal expenses insurance policies and we do not consider it to be unreasonable or unfair.

We expect an insurer to have sought expert legal advice on the prospects of success of a claim from a lawyer, and to have relied on the advice in coming to a decision on whether or not to fund a claim. Lloyd's were therefore entitled to rely on the advice of its panel solicitors in withdrawing cover in late 2009.

However, Mr and Mrs S's new solicitors contacted Lloyd's in March 2010, and provided a reasoned argument as to why they considered the panel solicitors had not assessed the claim properly. They said that they did not consider that the panel solicitors had made reasonable enquiries of all available witnesses as to the historic boundary arrangements, including their neighbours, friends and family, which would establish that there was witness evidence to contradict the neighbours' evidence. They also said that Mr and Mrs S could establish that the original boundary line ran between the properties (through Land Registry plans and other evidence) and the burden would be on their neighbour to prove that either the true boundary was not in accordance with those plans or that they acquired adverse possession of the passageway. They did not consider that the gap was too narrow to be considered by the court as of real value to Mr and Mrs S, or that a court would be unwilling to grant the relief sought, especially since they could establish that their side passage had been used for access, storage and maintenance.

They also provided case law to support their opinion that an injunction was still likely to be granted by the court, even at this stage because the trespass was ongoing.

Society of Lloyd's was entitled to satisfy itself about the validity of the claim but it seems to me that ...[it] could have accepted the claim a lot earlier than it did. All the

further information and evidence provided supported that the solicitors' opinion of March 2010 was correct. Although it said that some of the explanations from Mr and Mrs S' solicitors were 'vague.' I am not sure I agree. Society of Lloyd's main concern also seemed to be that an injunction is normally an emergency remedy. Whilst this is sometimes the case, an injunction is simply an order that requires a party to perform an act, or refrain from some act. The solicitors explained that they thought an injunction would be granted because the trespass complained of was still continuing. I therefore do not consider that the further enquiries about this were entirely necessary.

The solicitors took action between March and September 2010 (when the terms of appointment were signed) to progress the case. It seems to me that it would be unreasonable for Society of Lloyd's to refuse to indemnify the cost of that work simply for the reason that it wanted further information. If the solicitors had waited to issue proceedings until after Society of Lloyd's had exhausted its enquiries, then the costs would have been covered. However, they proceeded presumably because they considered it in the best interests of Mr and Mrs S, and presumably in the hope that indemnity would have been confirmed within a reasonable time.

It therefore seems to me that given the particular circumstances of this case, it would be fair and reasonable for indemnity to be backdated to the date of Mr and Mrs S' solicitors' letter, confirming their opinion that the case had reasonable prospects of success.

The hourly rate

Society of Lloyd's has said that the policy allows it to only provide indemnity for the policyholder's own chosen solicitor at the same rate that its panel of preferred solicitors would charge. However, the policy does not state this and makes no reference to any terms of appointment with either panel or non-panel solicitors. What the policy does say is that it will "pay legal costs to a maximum of £50,000" with 'legal costs' being defined as "professional fees which you are bound to pay, including reasonable fees or expenses incurred by the appointed lawyer whilst acting for you in pursuit of civil proceedings".

'Appointed lawyer' is defined as "the solicitor, solicitors' firm, barrister or other suitably qualified person appointed by us to act for you".

I do not therefore consider that there is any basis on which Society of Lloyd's can cap the indemnity provided to the £125 per hour that its panel solicitors' would charge for this work. (And I note that in fact the panel solicitors normal charging rate, for work not carried out in bulk as part of its arrangement with Society of Lloyd's was considerably higher than this.)

It seems to me that as Society of Lloyd's contracted to indemnify Mr and Mrs S for their 'reasonable costs', the fair outcome of this complaint requires a determination as to what a reasonable hourly rate, reasonably incurred would be.

Mr and Mrs S's complained that the hourly rate of £125 in the terms of appointment is not sufficient. The solicitor with conduct of their case is a Grade A fee earner (ie a solicitor with over eight years' experience) but that his charging rate (ie £210 per hour during the course of their claim) is actually well within the court guideline rate for the

relevant area for a Grade B fee earner (ie of more than four years' experience), which is £169 – 225. They say that the case was complex with many contested elements and therefore required at least a Grade B fee earner.

Mr and Mrs S say that by contrast the rate offered by Society of Lloyd's is only £1 more than the guideline rate for a Grade D fee earner (ie unqualified staff), which is £119 per hour. (A Grade C fee earner is £162 per hour.)

Society of Lloyd's has not provided any evidence as to why a Grade B fee earner was not appropriate to deal with this case. It does not appear to have been straightforward and there was considerable witness evidence and expert evidence involved. I therefore am satisfied that it was not unreasonable of Mr and Mrs S to instruct the solicitor they did.

Having taken all this into account, I therefore consider that it would be appropriate for Lloyd's to indemnify Mr and Mrs S their solicitor's costs for the work which falls for cover, at their charging rate of £210 per hour plus VAT.

I also agree that the time taken to process these bills was not reasonable. In any event Mr and Mrs S have provided evidence that they have paid them some time ago. Whilst I do not consider it inherently unreasonable that Society of Lloyd's would not normally pay interim bills, I do consider that it should pay interest to Mr and Mrs S on the amounts which fall for cover under the policy and which they have already paid, from the date that they paid them. Mr and Mrs S's solicitor also claimed that their costs incurred in pursuing the complaint to this service should be covered. Our website and correspondence sent to consumers make it clear that professional costs incurred in connection with representing a consumer in referring a complaint to this service will not generally be covered because it is not necessary for a consumer to be represented. I have seen nothing to indicate that Mr and Mrs S were unable to bring this complaint without professional representation. Our service is an informal one, intended to be accessed direct and so on the basis of the evidence available I do not intend to make any award in relation to the costs of representation in bringing the complaint.

Finally, I also consider that Society of Lloyd's handling of this claim will have caused avoidable anxiety and inconvenience to Mr and Mrs S. There was unnecessary delay in settling any part of the costs for several months; delay in confirming cover and in not agreeing the terms of cover. I consider that an additional payment of £150 compensation for this is warranted.

my provisional decision

For the reasons set out above, it is my provisional decision that Mr and Mrs S's complaint is upheld. Society of Lloyd's should do the following:

- backdate indemnity for the claim to 22 March 2010 at the rate of £210 per hour plus VAT;*
- pay interest on the amounts to be reimbursed to Mr and Mrs S at 8% simple per annum from the date that they made each payment to the date of reimbursement; and*
- pay the sum of £150 compensation."*

Developments

Society of Lloyd's did not respond to my Provisional Decision.

Mr and Mrs S responded and said they did not consider that the compensation of £150 awarded in the provisional decision adequately reflects the anxiety and expense they suffered as a result of the insurer's actions, and which had nearly cost them dearly in pursuing their legitimate claim. They asked for the award to be reconsidered. They also asked that we calculate the sum of money that will be due to them because they do not have any confidence that the insurer will be completely honest with them.

my findings

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

I have taken into account what Mr and Mrs S have said, but our awards for compensation are not made in order to punish a business or as a fine; they are only intended to compensate the consumer for distress and inconvenience which they have been caused as the result of a business' actions. The level of compensation set out in my decision is in line with awards made by this service in similar types of case and I am not minded to increase the amount.

This service would not be able to provide Mr and Mrs S with a calculation of the exact amount they will receive as reimbursement for their legal costs - we do not have access to the solicitors' invoices and billing information. However, if they do not agree with the amount which Society of Lloyd's pays them, they could raise a new complaint.

my final decision

For the reasons set out above, it is my decision that this complaint is upheld. Society of Lloyd's should do the following:

- backdate indemnity for the claim to 22 March 2010 at the rate of £210 per hour plus VAT;
- pay interest on the amounts to be reimbursed to Mr and Mrs S at 8% simple per annum from the date they made each payment to the date of reimbursement; and
- pay the sum of £150 compensation.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr and Mrs S to accept or reject my decision before 16 February 2015.

Harriet McCarthy
ombudsman