

complaint

Mr D's complaint is about the handling of his legal expenses claim by Society of Lloyd's ("Lloyds").

All references to Lloyds include its claims handlers.

background

I issued a provisional decision on this matter in October 2015, part of which is copied below:

"In May 2013 Mr D was involved in a boundary dispute with his neighbour, which resulted in his neighbour bringing a claim against him. As a result Mr D made a claim on his legal expenses insurance policy for cover to defend that claim and bring a counterclaim. Lloyds accepted his claim and instructed one of its panel firms to act for him in the proceedings.

The panel firm instructed a barrister to advise on the merits of Mr D's defence and counterclaim. The barrister concluded that Mr D's prospects of making out the boundary line where he said it should be didn't substantially exceed 50%. But the policy only required the prospects of his case to be 50% before cover could be accepted so this claim fell within that. The barrister also said that Mr D's prospects in defending a claim for adverse possession were above 50%. Mr D's neighbours were making a loss of rent claim against him. The barrister said that the merits of Mr D defending this were below 50%. Mr D wanted to counterclaim in nuisance against his neighbours. The barrister thought this claim had over 50% prospects of success, subject to obtaining expert evidence. Overall the barrister concluded the major issue in the case was the true location of the boundary and that this claim was relatively marginal in terms of prospects of success. He cautioned against taking the matter to trial and suggested that the panel firm consider pushing for mediation or some other form of dispute resolution.

Lloyds reviewed the barrister's advice and asked the panel firm to explore settlement avenues. The panel firm did this in so far as they made a couple of offers to settle the dispute. It doesn't appear the neighbour accepted these offers or that other settlement avenues were pursued.

In November 2014 the case was heard at trial. Mr D's neighbour was successful in his claims against him. The court ordered that the position of the boundary was in line with where the neighbour's expert's report put it. Damages were ordered against Mr D as well as costs and interest. Mr D's counterclaim in nuisance won in part but the court found that the nuisance had been abated so made provision for damages. It was also ordered that Mr D would make an interim payment against his neighbour's costs of £48,000. The remaining amount claimed by the neighbour (about £17,000) was to be assessed or agreed.

After the trial, the panel firm reported the outcome of the trial to Lloyds. They also said that Mr D didn't help the outcome of the proceedings because the court found that he'd created facts to support his version of events, which were found to be untruthful. The panel firm said these facts weren't previously known to them.

At about the same time Mr D made a complaint to Lloyds about the barrister's conduct in the case. He thought the barrister hadn't done enough to defend him. Lloyds considered this as well as the panel firm's report. It concluded it was avoiding cover because the evidence Mr D gave at trial contradicted his earlier statements made to the panel firm and the barrister. It

said it was entitled to do this because Mr D had breached the conditions of his legal expenses insurance policy. This meant Lloyds wasn't prepared to meet either the costs Mr D had incurred by instructing the panel firm or his neighbour's costs.

After putting this to Mr D, Lloyds took advice from another solicitor about the position it was adopting. It received advice to the effect that it was entitled to avoid cover in the way that it did. Mr D wrote to Lloyds setting out what he thought had gone wrong in the case and what hadn't been taken into account. Lloyds advised that as it had been unable to resolve Mr D's complaint on the question of cover, he could refer his complaint to this service. It also asked the panel firm for a copy of the transcript of the Judge's findings so it could consider whether its earlier decision to withdraw cover was correct.

By January 2015 Mr D's neighbour obtained a final decision on the sum Mr D would need to pay him in costs. That sum amounted to about £66,000. Because Mr D wasn't able to pay, his neighbour obtained an interim charging order on his property. In February 2015 Mr D paid his neighbour £37,000. He has since taken out a second mortgage to cover some of the remaining sums owing to his neighbour.

Our adjudicator assessed Mr D's complaint and noted the evidence Mr D gave at trial. He concluded that Lloyds was entitled to avoid cover. But he also thought that the judge's decision to find in favour of Mr D's neighbour on the boundary line was the primary issue in this case. He said that the judge's findings were based on consideration of documents and expert evidence so Lloyds wasn't entitled to avoid the costs associated with this. Overall, our adjudicator recommended that Lloyds cover two thirds of the adverse costs ordered against Mr D.

Mr D and Lloyds didn't agree with this assessment so the matter has been passed to me to determine.

my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I'm currently minded to uphold Mr D's complaint.

The starting point is the policy. It covers all legal costs and expenses up to the limit of indemnity, which I understand is £75,000. Legal costs and expenses include reasonable legal costs, fees and disbursements, reasonably and proportionately incurred by the solicitors appointed by Lloyds- in this case the panel firm. The policy also covers the other side's costs, fees and disbursements incurred in civil claims where the insured has been ordered to pay them, or pays them with Lloyds' agreement.

The policy imposes the following conditions on Mr D:

- "b) not do anything that hinders us or the Appointed Advisor...*
- d) tell us immediately of anything that may materially alter our assessment of the claim*
- e) cooperate fully with the Appointed Advisor and us, give the Appointed Advisor any instructions we require, and keep them updated with progress of the claim...*
- i) minimise any Legal Costs & Expenses and try to prevent anything happening that may cause a claim..."*

Lloyds has avoided Mr D's policy on the basis that it says he provided misleading information to the panel firm and the barrister which he contradicted at trial. It says this was in breach of the policy terms quoted above. It goes on to say that had Mr D provided truthful and accurate information from the outset of the claim, any defence would've been assessed as not having reasonable prospects of success and the claim wouldn't have progressed to trial. Lloyds also says it avoided cover on the basis of Mr D's wilful misconduct, breach of an ongoing duty of good faith and non-disclosure of circumstances that could give rise to a claim under the policy.

In my view, taking everything into account, it's difficult to say Mr D made a wilful misrepresentation at trial or deliberately failed to give information, particularly if he wasn't asked about it by his legal representatives. The fact that the judge formed a view about Mr D based on his answers to a vigorous cross examination, doesn't in my view, automatically lead to the conclusion that he made a misrepresentation which entitled Lloyds to avoid the policy.

And I don't think it's right for Lloyds to suggest the outcome of the litigation was entirely down to Mr D's conduct at trial. It's clear from the documents I've seen that the barrister instructed on this case always thought that Mr D's claim to the boundary was borderline. He made his concerns clear about the way in which Mr D had conducted himself during the dispute with his neighbour. This is why he assessed the merits of Mr D defending the loss of rent claim at under 50%. This was one of the issues the judge picked up on at trial and found against Mr D on this issue. The barrister also warned against taking this case to trial and suggested matters should be resolved by alternative means. Despite this, the case progressed to trial and on the whole was lost by Mr D. Having considered the judge's findings, I can see that the decision he reached wasn't based entirely on the evidence given by Mr D. I accept that his evidence contributed to those findings but it certainly wasn't the defining factor in relation to boundary issue which was based, in the end, on the neighbour's expert's report.

The submissions and evidence provided by the panel firm don't show what Mr D was asked in cross examination at trial. I don't know whether he did keep to the questions asked of him but I accept that his answers fell outside of his witness statement and that this came as a surprise to his barrister. But this doesn't mean that he deliberately misled his legal representatives Lloyds. Mr D feels that he told the truth at trial. He says he made his case known to the panel firm but that he'd dealt with three to four different representatives since their instruction and that it's quite possible this information wasn't passed on. On the other hand, the panel firm says that what Mr D, and one of his witnesses said at trial wasn't known to them. They say that had this information been provided they would've had concerns and that the merits of Mr D's case would've changed to less than 50%. That said, they also say they would've referred what Mr D said to the barrister for review. Whatever the case, I haven't seen any evidence to suggest that the barrister or the panel firm specifically asked Mr D about the evidence he gave at trial. And given the comments contained in the panel firm's conference note dated October 2014, I think there was every possibility that Mr D could've deviated from the evidence he gave within his statement, especially if prompted in cross examination, because it was thought that he "tends to get quite passionate and side tracked". So in my view, it wasn't reasonable for Lloyds to penalise Mr D for not disclosing information that he was not asked about by the panel firm or barrister. Lloyds hasn't said whether it considers the new evidence given by one of Mr D's witnesses at trial is connected to any misleading information it says Mr D has given. But for the sake of clarity, I don't think it can be said this evidence has anything to do with how Mr D conducted himself, so I haven't taken this into account when making my decision.

Having considered the policy terms, I don't think that Mr D breached the conditions Lloyds is relying on. I say so because I don't think that Mr D did do anything to hinder the panel firm or the barrister. The barrister was still free to defend his case as best he could despite the outcome of Mr D's testimony at trial. It might be right that when Mr D gave evidence, his advisors thought the merits of his case were diminished, but by then the case was at conclusion so it wouldn't be fair for Lloyds to avoid cover based on this. And because I don't think that Mr D intentionally misled his legal advisors I can't say that he didn't cooperate with them or give them instructions. Rather I think it's more likely he wasn't asked about the matters he gave evidence on at trial. And whilst I accept that Mr D's testimony may well have swayed the judge's decision on this case, I don't think it was determinative. So I think it's too simplistic to suggest that Mr D increased Lloyds' cost exposure in this case. There were several parts to the case, but the main part of the dispute was clearly the boundary line, and the judgment on that turned on the expert evidence.

There is another matter that gives me cause for concern in this complaint. I have reviewed the conference note I referred to above. The note confirms the panel solicitor briefed the barrister about dealing with Mr D. He is recorded to have said "we will need to take care with him (Mr D) and brief him re his witness evidence". The note also sets out that both the solicitor and the barrister spent considerable time explaining the importance of how Mr D should conduct himself whilst giving evidence. In particular the note records the panel solicitor as having said "I advised (Mr D) that it was imperative that he keep to his statement and answer only those questions which he has (been) asked. I was frank and noted that (Mr D) tends to get quite passionate and side tracked. He confirmed that he would keep to the points asked". This suggests to me that both the panel firm and the barrister were concerned about what Mr D would say as a witness at court. Despite this they didn't reassess the merits of Mr D's defence and counterclaim as having under 50% prospects of success, so Lloyds didn't withdraw cover and the case proceeded to trial. So I can only conclude that the panel solicitor and the barrister thought the merits of Mr D's case still remained over 50%. The fact that this didn't bear out, in part because Mr D's evidence wasn't looked on favourably at trial, doesn't in my view mean that cover should be avoided by Lloyds.

Finally, I note that the only term in the policy that gives Lloyds the ability to void the insurance is this: "If the Insured makes any claim under the policy which is fraudulent or false, the policy shall become void and all benefit under this policy will be forfeited including the premium." Whilst the judge didn't believe Mr D's testimony and thought he was untruthful, he was considering a different question to the point I have to consider. The judge made findings on the evidence Mr D gave about incidents involving him and his neighbour. The issue for me is whether Mr D gave false or misleading information to his solicitors or to Lloyds. I don't think the judge's findings mean that Mr D's claim was fraudulent or false.

In all the circumstances, I don't think it was appropriate for Lloyds to avoid the policy and withdraw cover for his neighbours' adverse costs. And I'm surprised that Lloyds hasn't reconsidered its position based on the transcript of the judgement in this case. Instead it has taken no further action and chosen to wait for the outcome of Mr D's complaint with this service. So it follows that I'm currently upholding this complaint.

Mr D says that he and his family have suffered considerable trouble and upset as a result of Lloyds' decision not to pay his neighbour's costs. He says he has had to borrow money from friends and relatives and take out a second mortgage on his home to meet the adverse costs

order against him. He also says this has had a considerable impact on his health, and that he would never have pursued the matter to trial if he thought there was a risk he could lose and be ordered to pay costs of the value ordered. I'm persuaded by this argument. Mr D was on a low income and the value of the land in dispute was much less than the costs Mr D has been ordered to pay his neighbour. Because I think that Lloyds shouldn't have avoided the claim in the way it did, I think it should pay him compensation for the trouble and upset this has caused. I have set out what I think is reasonable to compensate Mr D for this below.

fair compensation

Lloyds should:

- *pay Mr D's claim for costs in line with the remaining terms and conditions of the policy. This includes payment of the panel solicitors' costs and disbursements and the adverse costs orders made against Mr D.*
- *reimburse Mr D for the interest he has paid in taking out a second mortgage to cover those costs, subject to Mr D providing Lloyds with evidence of how much this amounts to.*
- *pay Mr D interest at 8% per year simple[†] on the sums he has paid himself in respect of the adverse costs order and interest on his re-mortgage, starting from the date on which he paid these until they are paid.*
- *pay Mr D's reasonable legal costs in dealing with the removal of the charging order applied on his property once his neighbour's costs have been discharged. For clarity this sum should not be deducted from the indemnity offered by the policy.*
- *pay Mr D £750 for the trouble and upset it has caused him as set out above.*

[†] I understand that Lloyds is required to deduct basic rate tax from this part of the compensation. Whether Mr D needs to take any further action will depend on his financial circumstances. More information about the tax position can be found on our website.

Because of the way in which I have calculated fair compensation I would expect Lloyds to give preference to payment of the adverse costs order over the panel firm's costs within the level of indemnity imposed by the policy."

developments

I asked both parties to provide any other comments or information they wanted considered in response to my provisional decision.

Mr D has confirmed that he accepts the findings contained in my provisional decision. Lloyds has not responded.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, and in the absence of any further evidence by either party, I remain of the view that this complaint should be upheld.

fair compensation

Lloyds should:

- pay Mr D's claim for costs in line with the remaining terms and conditions of the policy. This includes payment of the panel solicitors' costs and disbursements and the adverse costs orders made against Mr D.
- reimburse Mr D for the interest he has paid in taking out a second mortgage to cover those costs, subject to Mr D providing Lloyds with evidence of how much this amounts to.
- pay Mr D interest at 8% per year simple[†] on the sums he has paid himself in respect of the adverse costs order and interest on his re-mortgage, starting from the date on which he paid these until they are paid.
- pay Mr D's reasonable legal costs in dealing with the removal of the charging order applied on his property once his neighbour's costs have been discharged. For clarity this sum should not be deducted from the indemnity offered by the policy.
- pay Mr D £750 for the trouble and upset it has caused him as set out above.

[†] I understand that Lloyds is required to deduct basic rate tax from this part of the compensation. Whether Mr D needs to take any further action will depend on his financial circumstances. More information about the tax position can be found on our website.

Because of the way in which I have calculated fair compensation I would expect Lloyds to give preference to payment of the adverse costs order over the panel firm's costs within the level of indemnity imposed by the policy.

my final decision

For the reasons set out above, I uphold Mr D's complaint Society of Lloyd's and direct it to comply with the award of fair compensation I have made.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 4 January 2016.

Lâle Hussein-Doru
ombudsman