## complaint

Mr B is unhappy that Ageas Insurance Limited has refused to meet a claim under his legal expenses insurance policy. Ageas used agents to handle the claim on its behalf. All references to Ageas in this decision include reference to these agents.

## background

Mr B was the subject of professional disciplinary proceedings several years ago. He was suspended from practising for 12 months in 1998 and in 2000 conditions were imposed on his registration. These conditions included that he be supervised and were renewed annually The supervision requirements meant that effectively, he couldn't get employment and thereby prove his fitness to practice and get the conditions lifted. And I understand his name was permanently removed in 2006.

Mr B made a claim under a previous legal expenses policy to try and have the removal of his name from the professional register challenged by judicial review. However, the solicitors acting (first solicitors) applied out of time and his application for judicial review was struck out.

Mr B therefore took professional negligence proceedings against the first solicitors. The first solicitors admitted they had been negligent but denied that he'd suffered any loss. I understand Mr B instructed solicitors (second solicitors) to act for him and also around the same time made a claim under a different insurance policy for cover. He now wants to take proceedings against the second solicitors and against the expert witness instructed by them to advise on his chances of getting alternative employment, in order to calculate his loss of earnings. The expert had provided a report in 2013, which said he didn't think that Mr B would have got alternative employment, even if his name had been restored to the register, given his age and length of time he'd not practiced. Mr B hadn't employed for almost 10 years and aged over 60 at the time. Mr B disputed this. He says that doctors can and do continue to work past normal retirement age.

Mr B therefore made a claim under his policy with Ageas in 2014 to sue the expert and the second solicitors for relying on his advice. However, Ageas has refused to fund the claim.

Ageas' in-house solicitor looked at this and said it was unlikely to succeed, partly because there was no expert evidence that the report was incorrect. As the policy requires all claims to have a reasonable chance of success (ie more than 51%) it wouldn't be covered under the policy.

Ageas also said that the event giving rise to the claim happened before the policy started. It said the ''event'' was the striking out of the judicial review application in 2008 and the report (obtained in 2013) was in relation to that and therefore not covered. In addition, the policy requires any claim to be notified within 30 days of a dispute arising and the report was obtained in 2013 and the claim not made until April 2014.

Mr B was unhappy with this. He says:

- The solicitors had no justification to say he wouldn't have been able to get another job, if he'd got his name restored on the register unconditionally.
- The expert knew nothing about his profession and rules of employment.

- Four doctors have told him – and he's provided evidence to support this – that if he'd had unconditional registration, they would have been willing to offer him a job under supervision.
- The expert said his duty was to the court and not to Mr B, but he doesn't accept that. He paid him (albeit under insurance cover).
- He has provided quotes from former colleagues as to his competence as a doctor.
- The opinion on his case was given by an in-house lawyer, who's employed by Ageas to find reasons to decline the legal expenses claims. He isn't independent; and hasn't given details of his area of expertise or practice – is he retired, has he kept up to date? Without that, he can't be regarded as a qualified solicitor.
- In addition, he hasn't given reasons why he would disregard the judgement of the court in dismissing his application; didn't quote any case law to explain his opinion; didn't address the offers made to him at court in 2008. The General Medical Council offered a "fairly substantial" amount to settle the matter. That would usually be considered to mean that he had a more than 70% chance of winning his claim.
- A barrister instructed by the second solicitors said he had a good chance (80%) in proving negligence and said his claim might be worth around £60,000.
- He reported the claim as soon as he knew the expert wouldn't amend his opinion.
- And the dispute arose in 2013 – the date he provided his flawed report – and therefore was after the date he took out this policy (which was in 2012).
- He's provided an opinion from a barrister that says he had a good chance of succeeding in his claim against the first solicitors.
- He continued the case on his own and presented his evidence about the chances of getting work. He obtained a settlement from the first solicitors by mediation. There were three solicitors and one barrister who succumbed to his arguments and they didn't contend that he'd had no earning potential. That shows that they knew he could have got work and therefore that the expert's report was wrong.

**my findings**

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

Mr B's policy covers the costs of an ''event'' that happens within the period of cover. It defines ''event'' as being: "the initial event, act or omission which sets off a natural and continuous sequence of events that subsequently gives rise to a claim for indemnity against Us".

I don't agree with Ageas that this dispute pre-dates its policy with Mr B. It says that the reason that the report was obtained from the expert was due to the striking out of his judicial review claim in 2008. It isn't reasonable to say that it's a natural and continuous chain of events from that act of negligence to the obtaining of a report that (Mr B says) was also negligent. The alleged negligence by the expert would be an intervening event. So, while the report wouldn't have been obtained had it not been for the 2008 events, there wasn't a continuous chain from then to the dispute about the expert's report.

I also don't think it's fair for Ageas to reject the claim on the basis it was reported four months after the report was prepared. As Mr B has pointed out, he was hoping the expert would change his advice. But also it's long been our position that an insurer can't reasonably rely on breach of a policy condition (such as a condition requiring a policyholder to report a claim within a certain time) unless it can show it has been prejudiced by that breach. This means that unless Ageas can show that it's worse off for some reason because it didn't

know about the claim in January 2014 instead of April 2014, it can't use this term to reject it. There's no evidence, as far as I'm aware, that its position is any different as a result of this delay.

But the policy also requires there to be reasonable prospects of a legal claim succeeding before cover will be provided. It is generally for an insured to prove their claim – that is to show that they have a valid claim under the policy. This means that Mr B would have to show that he has a reasonable chance of succeeding in any legal claim against the expert and the solicitors.

The policy terms reflect that. It says that cover will be provided "if you can satisfy us that there are sufficient prospects of success in pursuing or defending your claim...We may require you …at your expense to obtain the opinion of an expert or counsel on the merits of a claim or legal proceedings. If we subsequently agree to accept the claim, the costs of such an opinion will be covered".

However, in practice legal expenses insurers often provide a legal opinion about the case – sometimes from an in-house member of staff or from an independent solicitor. This is because they are usually better placed to get that assessment. However, this doesn't mean it is obliged to get an independent assessment of every case.

In Mr B's case, an in-house solicitor and claims-handler assessed the claim. He didn't think that there was a reasonable chance of succeeding against the expert or the second solicitors, given he was apparently qualified and experienced in the type of earnings assessment in Mr B's profession and he'd been instructed to give his opinion. He didn't think there was any evidence he hadn't done that properly, despite Mr B's strength of feeling about this.

I don't think this opinion should be disregarded simply because he hasn't provided details of his employment and practice history or because he's employed by Ageas.

The barrister instructed by the second solicitors (in October 2012) said there was a good chance of persuading the court that the second solicitors were negligent and the "value of the claim could be in the region of £60,000" which is what Mr B said he could earn in a year. I can therefore understand why Mr B was unhappy to receive the expert's opinion that he wouldn't have found work and therefore his claim wasn't worth pursuing.

Mr B says that he had solicitors'' and counsels'' opinion that he was employable – if he could have got the record changed – and Ageas is wrong to base its assessment of prospects of success on the expert's report.

Mr B has provided detail about the legal case, including character references and testimony from colleagues that he says record that he was an excellent surgeon, doctor and colleague. Mr B has also provided a further counsel's opinion dated October 2015. This says that the pleadings drafted by the second solicitors are inadequate but according to the complainants'' own version damages are modest (£20,000 - £40,000).

Initially, counsel said that while there was a good chance of proving negligence "the causation arguments will be difficult and it is likely that C''s loss of chance (to work as a locum) is only around 10-20%. Accordingly, the damages based on C''s own figures are relatively modest".

But this advice was supplemented after a conference with Mr B. The barrister added that the particulars of claim submitted by the second solicitors should have included other particulars which might have meant his loss of earnings would have started in 2007 not 2008. And if arguments had been put in 2008, Mr B's chance of successfully achieving an agreement with the GMC for removal of conditions etc would have been more than 50%, not 10-20%.

The barrister also says "once breach of duty/negligence has been established C will have to establish what loss he suffered. In my opinion this will be very difficult, as highlighted in D''s defence, namely that "there was no realistic prospect of the claimant negotiating improved conditions and his prospects of securing employment were negligible" as he was 69 years old in May 2007 and had not worked as a doctor in the UK for 10 years".

This opinion, which is about the chances of success and likely award that might be made against the first solicitors acknowledges that it will be difficult to prove that Mr B lost earnings as a result of their negligence, for the same reasons the expert cited: his age and length of time he'd been out of work. I don't think that this opinion can be taken to mean that the expert (or second solicitors) advice was wrong. Neither dos that fact that Mr B obtained a mediated settlement with the first solicitors. Legal disputes are settled for a number of reasons and this doesn't mean the expert was wrong or indeed that he was negligent.

Also this was an assessment of the merits of claim against first solicitors not the second solicitors or the expert. And doesn't give any reasons why the expert's opinion shouldn't have been relied on.

I don't therefore consider that Mr B has established that there is a reasonable chance of succeeding in any legal claim for professional negligence against the expert or the second solicitors.

**my final decision**

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 8 July 2016.

Harriet McCarthy
**ombudsman**