

complaint

Miss B complains about Tradewise Insurance Company's decision to revoke indemnity for her legal expenses, which led to her accepting an element of contributory negligence and a reduction in the damages she received from a third party for personal injuries she suffered in a road traffic accident.

background

I issued a provisional decision during February 2013 in which I found that it was inappropriate for Tradewise Insurance Company to have withdrawn funding for Miss B's claim in May 2010, in the light of the favourable counsel's opinion, and to have refused to reinstate funding for Miss B to negotiate the quantum of her claim once liability had been agreed.

I considered that Tradewise Insurance Company should pay the amount of the reduction in damages which Miss B received from the defendant as the result of accepting a 10% element of contributory negligence for the accident, as well as pay the shortfall of the legal costs relating to the period after 4 May 2010, such costs to be agreed, or if not agreed, assessed by the court under Civil Procedure Rule 48.3, together with interest at 8% per annum on any costs already paid.

In addition, I considered that it would be appropriate for Tradewise Insurance Company to pay compensation of £250 for the distress and inconvenience Miss B was caused by its incorrect withdrawal of indemnity for her claim.

responses to my provisional decision

Both parties responded to my decision. Miss B accepted my provisional decision in full.

Tradewise Insurance Company Limited's agent did not accept my decision. It made the following submissions:

- It does not agree with the decision to award the shortfall in damages to Miss B. If cover had not been withdrawn, the case on liability could have progressed in one of four ways: a split of 90/10 may have been agreed in any event. The litigation risk would have been a concern to Miss B regardless of whether or not she had continuing cover. As counsel pointed out in his advice, the adverse consequences that a negative finding on contributory negligence would have had on Miss B's damages would be far more significant than any adverse costs bill. It is felt more likely to have been the former than the latter which will have been Miss B's principal consideration when considering litigation risk.
A global settlement could have been achieved on quantum which took into account the litigation risks in relation to contributory fault. In counsel's view that was the most likely outcome in relation to the proceedings. The issue of contributory fault could have gone to trial, and Miss B could have lost. On counsel's advice, there was a 20-30% chance of the later eventuality, in which case she would have recovered substantially less than the sum of that she ultimately achieved. Fourthly, the issue of contributory fault could have gone to trial, and Miss B could have won. It is only if the fourth possibility occurred that Miss B would have recovered the full sum.

- There is a strong likelihood that even if they had remained on cover, that she would have recovered damages which were the same or very similar to those agreed, and also a chance that she would have recovered significantly less. In addition, the ATE premium was recovered in full from the defendants.
- It does not agree with the ombudsman's decision to allow the proportion of claimant's solicitor's costs which were incurred after the agent's involvement. If there is any shortfall in costs from 4 May 2010 onwards, those irrecoverable costs will have come about in a combination of ways, including ordinary inter parties costs which the judge (or solicitors in negotiation) concluded were not reasonably necessary for the furtherance of the case. Those costs would have been incurred by the solicitors regardless of the agent's conduct, and they would not have recovered them from the agent under the indemnity.
In addition, costs associated with dealing with insurers and funding arrangements would not normally be recoverable from the other side. Whilst the solicitors would have incurred some of the costs in communicating with the ATE insurer, there is no reason to suppose that they were any higher than the costs that would have been incurred communicating with the agent if they had remained on cover. There were also costs associated with the complaint about the agent which are not costs which would ordinarily be awarded against the agent and should not form part of any award. The Ombudsman appears to have accepted that the solicitors will have incurred some irrecoverable costs even before 4 May 2010; so to suggest that all the irrecoverable costs after that date were a consequence of the decision to withdraw cover should not stand.
- In addition, by his own admission, the ombudsman stated that he was unable to decide whether Miss B's own solicitor's fees were reasonable.

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 considered the points made by the agent in their response to my provisional decision. The first point they have made is that if the cover had not been withdrawn the case on liability could have progressed in one of four ways, including that a global settlement could have been achieved on quantum, which took into account the litigation risks in relation to contributory fault (which was the barrister's view of the most likely outcome), and a split of 90/10 may have been agreed in any event, and the litigation risk would have been a concern to Miss B regardless of whether or not she had continuing cover. They say that Miss B would only have recovered the full sum if the issue of contributory fault had gone to trial and she had won. Even if it had remained on cover, Miss B could have recovered damages which were the same or similar to those agreed and she could have recovered significantly less.

I have taken into account what has been said, but it appears to be speculating on what could have happened in Miss B's legal case if the case had been funded. I can only consider the actions of Tradewise Insurance Company and its agents and I am still of the view that it was not appropriate for funding to have been withdrawn on 4 May 2010 when the agent had been provided with a counsel's opinion that the offer was too low and could safely be rejected. It did not obtain a second legal opinion and it effectively ignored the legal advice it was given by a qualified solicitor and barrister. Also, Miss B could always have won more than the figure finally agreed.

The agent objects to my decision to award the shortfall in the damages Miss B received. It says that the reduction in damages was a direct effect of an agreed liability apportionment with the defendant's solicitors and suggests that this service should obtain the correspondence between the parties to determine the reasoning behind the liability apportionment of 90/10. However, this service has already obtained the correspondence between the parties and I made detailed reference to it at the top of page 5 of my provisional decision. It was on the basis of that evidence that I considered that the reduction of 10% for contributory negligence which was agreed with the third party was a consequence of the cover being withdrawn by Tradewise Insurance and it should bear liability for the reduction in the damages Miss B received.

It also objects to my decision to award the shortfall of legal costs incurred after 4 May 2010 when indemnity was withdrawn. It says that any shortfall in costs from 4 May 2010 onwards came about in a combination of ways including costs which were not reasonably necessary for the furtherance of the case, costs associated with dealing with insurers and funding arrangements and costs associated with the complaint against it.

In my provisional decision, I made provision for this when I stated that costs associated with bringing the complaint to this Service would not have to be paid. I also stated that Tradewise Insurance was only liable to pay legal fees in accordance with the definition in the policy of legal fees.

I appreciate that Miss B's solicitors have not received a breakdown of the items which were disallowed by the defendant's insurer's costs negotiators so it will not be easy to ascertain the costs which Tradewise will have to pay. However, this does not mean this can be ignored.

my final decision

For the reasons set out above, it is my final decision that this complaint is upheld.

Tradewise Insurance Company Ltd should pay:

- 1 The amount of the reduction in damages which Miss B received from the defendant as the result of accepting a 10% element of contributory negligence for the accident;
- 2 The shortfall of the relevant legal costs relating to the period after 4 May 2010 (apart from costs relating to correspondence with this service in respect of Miss B's complaint) such costs to be agreed, or if not agreed, assessed by the court under Civil Procedure Rule 48.3. If Miss B has already paid the solicitor's fees, then interest should be added to any reimbursement made by Tradewise Insurance Company, at 8% per annum;
- 3 Compensation of £250 for the distress and inconvenience Miss B was caused by its incorrect withdrawal of indemnity for her claim;

In full and final settlement of the complaint.

Christopher Tilson
ombudsman