

The complaint

L, a limited liability partnership, complains that Amtrust International Underwriters DAC refused cover for a claim on its professional indemnity insurance policy.

Where I refer to Amtrust, this includes its claims handlers and agents acting on its behalf.

What happened

L is a limited liability partnership that provides financial services to its clients. In June 2014 a client contacted L to say he was unhappy with some advice given to him and wanted to pursue a claim for losses arising out of that advice. A few days later he called to say he had decided not to pursue the matter and he then confirmed that in writing.

In August 2014 the client contacted L again to say he would in fact be pursuing a claim. L contacted Amtrust to advise of the claim. Amtrust asked why it had not been referred in June, saying this was a breach of the duty to give notice immediately of any claims, or any circumstances that might give rise to a claim. Amtrust said it was reserving its rights about providing cover but appointed solicitors to assist L, in the hope that would lead to the claim being resolved. Some correspondence followed but the client then took no further action for some time.

In 2017 L advised that it had heard from solicitors acting for the client regarding proposed legal action. Amtrust then said it would not provide cover for the claim because it had not been notified immediately. L complained but Amtrust did not change its position. In its final response Amtrust said the requirements to give notice immediately were a "condition precedent" to cover meaning that, unless they are strictly complied with, it has no liability to provide cover.

When L brought the complaint to this service our investigator thought Amtrust's decision to refuse cover was unfair. She said Amtrust couldn't reject a claim on the basis of a breach of a condition of the policy, unless the breach related to the circumstances of the claim. And she thought the late notification hadn't caused any prejudice to Amtrust.

Amtrust disagreed. Its solicitors raised a number of points on its behalf, in particular that the approach adopted by the investigator would only apply to a claim by a consumer and, as L is a business, wouldn't be relevant here; businesses are expected to understand and to comply with contracts they enter into. They said the investigator's view ignored the weight of law supporting Amtrust's position and she hadn't explained why she was departing from the law.

As no agreement was reached the complaint was passed to me to decide and I issued a provisional decision. In the provisional decision I said

The policy includes cover for any claim for compensation and/or damages (including legal costs) made against L which it may become legally liable to pay and which arises out of, or concerns the conduct of, L's professional business. So cover is available under the policy for the type of claim made by L's client in this case.

However, the policy terms say it's a "condition precedent" to cover being provided that L gives notice immediately of any claim, or any circumstances that may give rise to a claim. "Circumstance" is defined in the policy terms as

"information or circumstances of which the Insured is aware which suggests that a claim may be made against the Insured which the Insured may become legally liable to pay and which arises out of the exercise and conduct of the Insured's Professional Business."

The policy terms are clear that L had to notify Amtrust of any claims or circumstances that may lead to a claim immediately, and that this requirement is a condition precedent. So that's the starting position when considering the complaint; in effect, Amtrust only wishes to provide cover if any claim or circumstances that may lead to a claim are notified immediately.

Amtrust's solicitors say the legal position is clear – L is a business, not a consumer, so doesn't have the same protections that consumers have; a business is expected to understand the nature of the contracts it enters into. And in any event, it says the breach of the condition (L's late notification of the claim) was related to the circumstances of the claim. Finally, they say the question of prejudice is irrelevant since there is no legal basis to introduce this concept.

I have to take into account the policy terms and the relevant law. But I'm not bound by them in the same way as the courts. Ultimately my role is to decide what's fair and reasonable, taking into account all the circumstances. Bearing that in mind, I've considered whether it would be fair to apply the policy terms strictly in the circumstances of this case.

Amtrust says the claim should have been notified immediately when the issue first arose in June 2014. I don't think it would be fair to treat that as a claim. The client contacted L within a few days to say he didn't intend to pursue the matter and confirmed that in writing a week after his initial letter. I can see why L thought there was no claim at that point.

However, even if the client said he wasn't going to pursue the claim, there was nothing to stop him changing his mind – which of course is what happened. So Amtrust says L should have been aware these were circumstances that could lead to a claim. The client's letter explained that he thought he had lost around £300,000 as a result of poor advice, and said decades of prudent financial planning, mostly following advice from L, had been "blown out of the water..." The client said that due to the sums involved, there was a very significant problem with his pension fund and he couldn't walk away from this. So even if there wasn't a claim at that point, L was aware this was a serious issue for the client. On that basis it was always possible the client might come back again. So I think these were circumstances that might lead to a claim. And that means, on the basis of the policy wording, L should have notified Amtrust at that point but didn't.

So L was in breach of the condition in the policy. I appreciate that it's a condition precedent so, strictly speaking, Amtrust would not have to provide cover. That's the position set out by the policy terms. And I have taken that into account, but I have to decide what's fair and reasonable.

I've considered what would have happened if L had notified Amtrust in June 2014. At most, Amtrust would have asked for some more information; there was no further action that could have been taken at that point. L contacted Amtrust promptly in August, and Amtrust was able to deal with the matter; appointing solicitors to assist L. So in reality, it made no difference whether L contacted Amtrust in June or in August – things would have proceeded in the same way. There was no prejudice to Amtrust.

Amtrust's solicitors say the issue of prejudice is irrelevant. That may be the strict legal position but looking at this on a fair and reasonable basis, the position is rather different. In my judgment, it wouldn't be fair to reject a claim in these circumstances, where L's actions made no difference to how the claim could be dealt with.

The aim of the condition precedent is to emphasise the importance of giving notice of claims early. There's a good reason for that – it allows Amtrust to step in and manage the claim from the start, making sure it has the information it needs and is able to control how the claim is handled. Any delay may affect that – for example if L had made admissions to their client or incurred substantial legal costs which Amtrust had no control over, that would make it harder for Amtrust. I understand why it wouldn't wish to cover a claim in those circumstances. But looking at the specific circumstances of this case, I don't think it would be fair to reject the claim when no steps had been taken at all and the position was exactly the same. Amtrust was able to consider the claim in August 2014 in the same way as it would have done in June.

I understand L was able to settle the claim brought by the client by paying him the sum of £55,000 to cover both compensation and his legal costs. So Amtrust should reimburse that sum, together with any reasonable legal costs L incurred in defending the claim.

On that basis, I said I intended to uphold the complaint and direct Amtrust to reimburse the sum of £55,000 and reimburse any legal costs L had incurred, and pay interest on those sums.

L has replied to the provisional decision to say it accepts the findings. Amtrust has not accepted the provisional decision and its solicitors have made detailed comments, which I have summarised as follows:

- While it accepts the ombudsman is able to depart from the law if it considers it fair and reasonable to do so, this power should be used sparingly and in very limited circumstances.
- The ombudsman must also be consistent in its approach to dealing with what is “fair and reasonable” in cases of breach of conditions precedent by commercial policyholders. In other similar cases involving a condition precedent, the ombudsman has confirmed that the strict legal position applies and breach of the condition allows the insurer to decline the claim.
- ICOBS specifically allows an insurer to reject a claim for breach of condition if the breach is connected to the circumstances of the claim – which is the case here.
- This case involves a commercial customer, who should have understood and complied with the policy conditions and, if it did not, it should not be given the same protection as a consumer.
- The issue of prejudice does not apply, even for consumers, in cases like this and the Ombudsman cannot rely on prejudice to justify finding against Amtrust on “fair and reasonable” grounds. A decision on another complaint confirmed that section 11 of the Insurance Act 2015 did not apply as the contract pre-dated this legislation (as it does in this case). So the common law position applies, where the breach of a condition precedent entitles the insurer to decline the claim.

What I've decided – and why

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

In its response, Amtrust's solicitors made a number of comments about the investigator's findings. Our investigator provided her view on the case but once the complaint was passed to me I reviewed the whole matter afresh and reached my own conclusion. Any views given by the investigator do not form part of my decision.

Amtrust has set out the legal position and referred to other cases decided by this service which it says support that position. I've summarised those points above but the broad thrust of their argument is that an insurer is entitled to decline a claim where there has been a breach of a condition precedent by a commercial customer, and the issue of prejudice is irrelevant. It says the provisional decision goes against this logic and can't be considered fair and reasonable in the circumstances of this case (where it's accepted there is a breach of condition precedent by a commercial customer, and the breach is connected to the claim).

I've considered all these points carefully. But I made it clear in my provisional decision that I understood the legal position. And while we aim to be consistent in our decision-making, every case has to be considered on its own facts. So what was decided in one case won't necessarily affect the outcome of another. As I've explained, I have to take account of the law, but I need to decide what's fair and reasonable taking into account all the circumstances.

Although L didn't report the incident immediately, I've taken into account that the client had said - both on the phone and subsequently confirmed in writing - that they did not intend to pursue a claim. Strictly speaking, L should have notified Amtrust - although there wasn't a claim at that point, there were circumstances that could potentially have led to a claim. But I can see why L may have thought the matter did not need to be reported. And it did notify Amtrust immediately once it became apparent there would be a claim.

As I have also explained, Amtrust was able to appoint solicitors and provide support. So the short delay didn't make a difference. And while Amtrust says the issue of prejudice isn't relevant, the circumstances of this particular case, and the sequence of events that took place, are relevant. Looking at everything in the round, it wouldn't in my view be fair to apply the strict legal position, where I think L acted reasonably and Amtrust was able to deal with the claim in exactly the same way it would have dealt with it, had the claim been reported sooner.

For these reasons it remains my view that, in the particular circumstances of this case, it wouldn't be fair to decline the claim,.

Amtrust has made one final point, namely that if the claim were covered, an excess of £2,500 would need to be paid and it doesn't seem L has paid this. If the excess hasn't been paid, then that may be deducted from the settlement.

Putting things right

To put things right, Amtrust needs to reimburse to L the sum of £55,000 it paid to settle the claim (less any excess payable), together with any reasonable legal costs incurred in defending the claim made against it.

My final decision

My final decision is that I uphold the complaint and direct Amtrust International Underwriters DAC to pay to L

- the sum of £55,000 (less any excess payable under the policy terms, if it hasn't been paid) and

- any reasonable legal costs incurred in defending the claim made against it.

Amtrust International Underwriters DAC must also pay interest on the sum of £55,000 at the simple rate of 8% per year from the date L paid that money to its client to the date it makes the payment; and pay interest at the same rate on the legal costs incurred by L from the date those costs were paid by L to the date it makes the payment.

* If Amtrust International Underwriters DAC considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell L how much it's taken off. It should also give L X a certificate showing this if L asks for one, so they can reclaim the tax from HM Revenue & Customs if appropriate

Under the rules of the Financial Ombudsman Service, I'm required to ask to accept or reject my decision before 9 July 2020.

Peter Whiteley
Ombudsman