

The complaint

Mr A's complaint is about an "*after-the-event*" legal expenses insurance policy with Amtrust Europe Limited.

Amtrust is the underwriter of this policy, *i.e.* the insurer. Part of this complaint concerns the actions of the agents it uses to deal with claims on its behalf. As Amtrust has accepted it is accountable for the actions of the agent, in my decision, any reference to Amtrust includes the actions of the agents.

What happened

Mr A was involved in a dispute about cavity wall insulation, which started in 2018. He instructed solicitors on a '*no win, no fee*' basis to pursue damages from the third party. Mr A's solicitors arranged the '*after-the-event*' insurance policy with Amtrust, to insure the loan Mr A took to pay his disbursements and against any of the third party's costs awarded against him.

In late 2020, the solicitors closed down and his case was transferred to another solicitor firm. A trial was set for January 2023. Mr A says that a week before the trial date, the solicitors said they could not proceed because there was insufficient funding.

Mr A says the solicitors asked Amtrust if it would provide cover for an additional loan but it refused. He says the solicitors then asked if Amtrust would cover the third party costs and his costs and disbursements up to that point, if he discontinued the case. Amtrust said it would not because as there were still reasonable prospects of the claim succeeding, the claim should continue to trial.

Mr A says he wanted to continue his legal claim to trial but was extremely concerned about the risk of being liable for significant costs if he did so. He therefore wanted to know if Amtrust would cover any adverse costs, if he self-funded the trial costs and lost the case. Mr A says Amtrust did not reply to his solicitors with an answer to this question, despite chasers, so he was therefore forced to discontinue his legal claim because he could not risk being liable for more costs if he went ahead.

Amtrust has not provided any cover under the policy, as it says the policy excludes cover in the event of the claim being discontinued without its approval. Mr A is therefore liable for the third party's costs. I understand his own costs will be written off as the loan is a "*non recourse loan*"

Mr A is very unhappy with Amtrust's handling of the matter. He has explained how stressful the situation has been for him and his family: the worry about the costs he is responsible for has caused him overwhelming anxiety, affecting his work, mental and physical health. Mr A wants Amtrust to cover the third party's costs, any other costs he has to pay and compensate him for the harm the situation has done him and his family.

Mr A has made a number of points in support of his complaint. I have considered everything he has said and have summarised the main points below:

- The policy with Amtrust was to cover him if he had to pay the third party's costs and his own costs and disbursements of bringing the claim. So it should meet that obligation.
- His solicitors first asked Amtrust about a top up loan in the summer of 2022 Amtrust dragged the matter on, asked for more information and took months to reach a decision. It was not until November 2022 that Amtrust informed his solicitors it would not provide a top up. If Amtrust had provided an answer sooner, the solicitors would have had more time to find other options.
- Amtrust did not provide a clear response to the request from his solicitors about cover if he went ahead with the trial and lost.
- All this meant he had little time to make the decision and he was forced to make the decision to discontinue the case, as he could not risk more costs. The costs were also higher because it was discontinued so close to the trial date.
- Amtrust declined to consent to discontinuance and advised his solicitors that the claim still had prospects of success. This shows Amtrust agreed the claim should proceed to trial.
- He was willing and intended to proceed to trial, as evidenced by his repeated inquiries about indemnity if I lost at trial. Amtrust's lack of response on this point, left him unable to make an informed decision about self-funding.
- Even if Amtrust had confirmed he would not be covered, he would have been saved unnecessary finance costs and he could have discontinued sooner, reducing the amount of the adverse costs he now has to pay.

Amtrust says the solicitors did ask it about providing additional cover on a scheme basis *i.e.* for multiple risks, rather than for Mr A's claim only. The matter of providing top up to existing '*after-the-event*' policies is a complex underwriting matter that required the collection of data from the solicitors to review. Amtrust says it did not indicate that such cover would be granted and it was under no obligation to top up cover.

Amtrust says the original solicitors set up a policy that was clearly insufficient and the second solicitors were also aware of the limitations in respect of the policy limit.

Amtrust says it told the solicitors on 22 December 2022 and 13 January 2023 that it would not approve discontinuance of the claim on the basis that there was insufficient funding available on the loan. This is also clearly set out in the policy. Amtrust says the solicitors should have ensured funding was in place and advised Mr A about any costs risks. It does not therefore agree that it is responsible for any costs.

One of our Investigators looked into the matter. He said that any issue with the level of funding secured for Mr A was a matter for his solicitors and he may have a complaint against them. The Investigator also said Amtrust had no obligation to extend cover for a further loan amount and the policy and its position was made clear that it didn't give its approval and advised the case should proceed because it continued to enjoy prospects of success. He did not think that Amtrust was responsible for the position Mr A found himself in.

Mr A does not accept the Investigator's assessment. He says neither Amtrust or the Investigator have considered the impact on him of Amtrust's failure to respond to repeated requests, made between 5 and 13 January 2023, to confirm whether he would be covered if he proceeded to trial and lost. Without clarity on that point, he could not risk continuing, even though he had a good case. So Amtrust's lack of response forced him to discontinue his case. Mr A has provided copies of (redacted) emails between him and his solicitor which he says shows he wanted to proceed to trial.

The Investigator considered Mr A's submissions about this but did not change his assessment, as he said the solicitors only asked about cover if Mr A self-funded to trial and lost on 12 January 2023 and the claim was discontinued the next day. He did not therefore think that Amtrust was at fault for not responding before the claim was discontinued and the position Mr A is in.

Mr A remains unhappy with this and has made some further submissions in support of his complaint. Again while I have considered everything he has said, I have summarised his main points below:

- He could have agreed with his solicitor's advice to discontinue the claim on 5 January 2023, which would have saved him a lot of trial preparation costs.
- It is clear the only thing that stopped him doing that was that he had cover with Amtrust if he went to trial and lost. He had to explore which ever avenue was financially better for him. He therefore had to delay his decision to discontinue while getting assurances from Amtrust.
- He sought that assurance via his solicitors. He spoke to the solicitors on 5 January 2023 about getting an answer to that question from Amtrust, although the main focus at the time was getting permission to discontinue.
- His email to his solicitors on 12 January 2023 shows he had been seeking assurance about proceeding to trial and losing for the previous few days.
- The emails may not refer to telephone calls that were also happening at the time.
- His solicitor sent an email to him on 9 January 2023 which says he had written to Amtrust about his "*concerns and seeking reassurances*" which means he had mentioned to Amtrust both points (*i.e.* indemnification if he discontinued and also if he continued to trial and lost).
- Amtrust responded to the first point on 11 January 2023 but not the second. So his solicitors had to chase Amtrust for an answer to that point on 12 January 2023.
- His solicitor's email to him on 13 January 2023 says he had chased Amtrust a few times for an answer to this
- Amtrust was clearly aware from 9 January 2023 that he wanted an answer to this point and had until the morning of 13 January 2023 to respond but failed to do so.
- He feels this was deliberate to avoid committing to making any payment under the policy.
- Amtrust's failure to answer his query was a key factor in his ability to make an informed decision about self-funding to trial and so it is partially responsible at least for the costs incurred.

As the Investigator was unable to resolve the complaint, it has been passed to me.

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.

It is not in dispute that the policy will not pay any claim "*caused by or attributable to ... your decision to abandon or discontinue your case without our approval*". However, Mr A says that Amtrust unreasonably refused to increase the cover and delayed responding to that request for increased cover and the request for confirmation of cover if he self-funded the trial and lost. Mr A says that as a result of Amtrust's delays, he was forced to discontinue the case and the costs he is liable for are higher than they would have been had it provided an answer sooner.

I can see that this has been a very stressful matter for Mr A. However, I do not intend to uphold his complaint. I will explain why.

Request to increase indemnity

In June 2022, Mr A's solicitors asked Amtrust for permission to continue the case. Amtrust said it did not have the case file to be able to assess the request. I can see there was some further communication between Amtrust and Mr A's solicitors and in early August 2022 Amtrust noted that a report was supportive of the claim.

Amtrust also says the solicitors asked Amtrust to provide additional cover but this was on a scheme basis – *i.e.* for multiple risks and not just in relation to Mr A's claim. Amtrust said it needed more information, as this was a complex underwriting issue but it was under no obligation to provide further cover and decided not to.

I haven't seen Amtrust's response to this but I have seen an email from the solicitors, which says they were informed of the refusal to increase the cover on 25 November 2022 and that in the meantime, they'd had to proceed with the legal case and protect Mr A's position.

I can only consider Amtrust's actions as an insurer. Amtrust was entitled to ask for more information to support the request to increase the indemnity on the policy and was entitled to refuse to increase it. I do not think that it was unreasonable in refusing to increase the limit. There is also no evidence that supports that it took an unreasonable time to reach this decision.

Request for consent to discontinue claim and position on cover if Mr A funded the trial costs

In October 2022, Amtrust approved a request from the solicitor to incur a disbursement of over £3,000; and on 16 November 2022 the solicitors asked for consent to incur the trial fee of just over £1,000, which was also approved two days later. In late 20 December 2022 the solicitors asked for consent for a fee to apply to court for a consent order regarding witness evidence, which Amtrust also approved two days later.

From the papers provided to me, I can see the solicitors then contacted Mr A with concerns about the funding for the trial in early January 2023.

I have seen Mr A's emails of 5 and 6 January 2023, which said he would like to go ahead but that he needed to know how much his solicitors were expecting to be paid if he goes ahead on a self-funded basis and about cover for any adverse costs.

The solicitors emailed Mr A on 9 January 2023 and said they'd written to Amtrust to ask about discontinuance and asked for a response by the next day.

I can see they did email Amtrust on 9 January 2023 to say that the cover was for £25,000 but the cover needed was more like £90,000. The solicitors asked again if Amtrust would extend the cover or whether it would give approval to discontinue the claim. The solicitor's email of 9 January 2023 also said that they had tried to get further ATE cover from another insurer but had been unsuccessful and that they had advised Mr A that by discontinuing the claim, he would save the expense of his own disbursements and would limit the adverse costs risks. There is no evidence the solicitors asked about Amtrust's position if Mr A self-funded to trial and lost at that stage.

It appears the solicitors and Amtrust also spoke that day and Amtrust refused approval to discontinue. It confirmed this again on 13 January 2023.

Mr A says his solicitors thought this was unethical of Amtrust but the policy is clear; and if there were prospects of success in the claim there is a responsibility to continue in order to minimise the risk of a claim under the policy. Amtrust was therefore entitled to refuse approval to discontinue the claim. I do not think this decision was unfair or unreasonable and it was in line with the policy terms.

There's then a copy of an email from the solicitors to Amtrust timed at 16.10 on 12 January 2023 asking for confirmation that if Mr A self-funded and lost whether he would be indemnified for adverse costs. Mr A says his solicitors had also repeatedly been asking for clarity about the cover if he proceeded with the trial self-funding the shortfall in costs himself and lost but this is the only request that I can see in the evidence provided to me.

I also note that Mr A wrote in the early hours of 12 January 2023 to his solicitors asking for confirmation they had asked Amtrust about the position if he self-funded to trial and lost and requested a copy of its emails to Amtrust about this. No other emails or phone records have been provided.

I also note Mr A has provided an extract from a transcript of a telephone conversation between him and his solicitors on 12 January 2023 in which it confirms it will email Amtrust to ask about the self-funding to trial issue. Nothing in the transcript indicates that the solicitors had already asked Amtrust this and were waiting for a response.

Given this, while Mr A asked his solicitors about this earlier, I am satisfied it is likely there were no other requests for an answer to this question to Amtrust other than the email sent at 16.10 on 12 January 2023.

The 12 January 2023 email was not apparently answered until February 2023 but I note that the notice of discontinuance was filed on 13 January 2023, the day after the request for an answer to that query was sent to Amtrust.

I can see the solicitors apparently chased a response to the request made on 12 January 2023 but it only sent the request late the day before and was expecting a response by 2pm the next day. I do not think it was unreasonable that Amtrust had not responded with an answer by 2pm the next day.

As the evidence is that Amtrust were only asked this late on 12 January 2023 and the claim was discontinued the next day, I do not think I can reasonably conclude that the main reason that Mr A discontinued his claim, and thereby became responsible for the costs involved in the case, was due to anything done wrong by Amtrust.

Having considered everything provided to me, I am satisfied that Amtrust was entitled to refuse the further cover and was entitled to refuse approval to discontinue the claim. I am also not persuaded that Amtrust delayed responding to any queries, made on Mr A's behalf, such that it is responsible for any costs liability. Mr A was put in a very difficult position but I am not persuaded this was due to anything Amtrust did wrong.

My final decision

Despite my sympathy for Mr A's position, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 10 April 2024.

Harriet McCarthy
Ombudsman