



# Financial Services Ombudsman Scheme

## **Summary of the determination dated 15 February 2022 in respect of a complaint made to the Scheme that a general insurance provider had unfairly dismissed a claim made against an after the event ('ATE') insurance policy.**

### **Background**

In September 2017 the complainant issued proceedings in the County Court seeking damages as a result of a breach of contract and/or a duty of care in the sum of £32,869.90 due to an alleged defective installation of cavity wall insulation in 2011. There were three defendants named in the claim which was supported by a report by an expert witness.

The claim was progressed through the courts on a no-win-no-fee basis. As part of this the complainants solicitors at the time took out the ATE policy to ensure that if the complainant did not win his case, and the defendants had their costs and disbursements awarded against the complainants, the ATE policy provider would pay such costs and disbursements in terms of the ATE policy. Therefore the complainant expected that by entering into the ATE policy the worst that would happen to him financially would simply be that he lost his case but would not have to make any financial payments to anyone at all.

Following the closing of pleadings a Costs and Case Management Conference ('CCMC') was held in the County Court in November 2019 to consider the progression of the claim and agree a costs budget. At the first hearing the judge outlined that he had concerns in respect of the report by the expert witness and also with how the claim was pleaded. The Judge further ordered that any 'wasted costs' caused by the adjournment were to be borne by the claimant.

A further CCMC was held in the County Court in February 2020. The outcome of this second hearing was that the Judge noted that due to alleged issues with the ATE policy the complainant had not complied with the terms of the first order. The complainant sought a stay of the claim which was declined by the Judge who ordered:

- That the claim was allocated to the small claims track.
- The claimants to pay the wasted costs in respect of the first adjourned CCMC of £5089.
- The costs incurred up to and until the reallocation would be assessed on conclusion of the proceedings.

The complainant approached the provider for payment of the wasted costs as ordered by the Judge. Payment against the ATE policy was refused as the provider found that the Judge suggested that the expert report and pleading of the claim was so poor that the claimants were unlikely to recover all of the damages they were claiming. Unfortunately it also transpired that in the second hearing the claimants had not provided additional evidence but requested that proceedings be stayed for three months. This was not

granted by the Judge.

Based in the above the provider asserts that there had been a breach of various clauses to the ATE policy particularly that the claim did not have a reasonable chance of success and that the policy only covered one of the defendants rather than the three named in the claim to the County Court.

The complainant asserted that there were no issues of poor pleading and that the expert report was merely a preliminary report therefore the claim did have a reasonable prospect of success and the claim against the ATE policy should be upheld. In settlement of the complaint they requested a refund of the wasted costs which had been paid by the complainant.

## **Findings**

The Adjudicator found in regards to the arguments provided by the provider that:-

### **Reasonable prospects of success**

The provider referred to the comments of the Judge in the hearing in respect of the quality of the expert report and inadequate pleading of the claim. The Adjudicator disagreed, concluding that whilst the Judge was unhappy with the expert report and the pleading of the claim, the result of the second hearing was that the claim was allowed to continue, albeit in the small claims court which limited the maximum award payable to £10,000. In addition there was no application by the defendants to strike out the claim which he would have expected had the claim truly not had a reasonable chance of success.

### **Policy was limited to just one defendant**

Just one defendant was noted on the certificate of insurance but there were three defendants named in the court claim. The provider stated that by not disclosing all of the defendants to the claim, the complainant's solicitor had not fulfilled their duty to notify the insurer of all the relevant facts and therefore the policy did not extend to the remaining two defendants. The Adjudicator, after consideration of relevant case law, agreed that there had been a material non-disclosure and agreed that the policy was therefore only limited to that of the one named defendant.

### **The policy is invalid where inappropriate procedural steps are taken or there is a failure to reasonably limit costs**

The Adjudicator considered the transcripts from the two hearings and noted that the decision to adjourn the first hearing was taken by the Judge because the expert report was not of satisfactory quality. The Judge's comments illustrated that at the first hearing the claim was unfortunately not in an 'appropriate form' due to the issues with unsatisfactory pleading and/or the expert report and that this was the reason for the adjournment. There was no appeal by the claimants in respect of the first order.

It appeared that the conduct of the complainant and/or his solicitor had directly resulted in costs which were described by the Judge as 'wasted costs'. Naturally this means that the manner in which the claim was progressed has caused costs which were avoidable and which no reasonable complainant, properly advised, would have taken. The Adjudicator therefore agreed that the provider was justified in deciding not to indemnify the complainant in respect of these costs.

## **The Determination and Award**

Due to the issues in respect of the expert report, and/or alternatively, due to issues with the pleading of the claim, the Adjudicator found that the provider was entitled to rely on the exclusions contained in the policy terms and conditions and therefore justified in reaching its decision not to indemnify the complainant under the ATE policy for the wasted costs.

The complaint was not upheld.