

## **The complaint**

Ms B and Mr R are unhappy with what U K Insurance Limited did in relation to claims for breach of contract and professional negligence made by Mr R on their legal expenses insurance policy.

Although Ms B and Mr R are joint policyholders, as all submissions have been made by Mr R, for ease I'll refer to him in this decision.

## **What happened**

Mr R claimed on his policy in July 2023 as he had a dispute with a car dealership and wanted assistance with that. UKI accepted the claim and referred it to one of its panel solicitors for assessment. Mr R complained he hadn't been offered the freedom to choose his own solicitor.

In a separate claim for professional negligence against a panel firm where UKI had allowed him freedom of choice he said its terms of appointment (in particular the hourly rate offered) meant he was unable to obtain representation. He thought UKI was in breach of relevant legislation. And he said the requirement for a non-panel firm to agree to those terms hadn't previously been brought to his attention. So he thought UKI was unfairly attempting to introduce new terms mid-way through the policy term.

Our investigator said the terms of appointment were referenced in the relevant policy document. He didn't agree UKI had tried to change its requirements during the policy term. And given the wording of the terms of appointment (in particular as it related to the hourly rate) he didn't think this was a significant or unusual term of the policy which should have been brought to Mr R's attention prior to him agreeing to take cover out.

He didn't think UKI acted unfairly in saying Mr R didn't have the freedom to choose his own solicitor in relation to the car dealership claim. In relation to the professional negligence claim he reviewed information Mr R provided about the reasons why solicitors he approached weren't prepared to act for him. Having done so he didn't think that showed it was because they weren't prepared to accept UKI's terms of appointment. So he didn't agree Mr R's freedom to choose his own solicitor had been rendered meaningless by those terms. He didn't uphold the complaint. And he said information Mr R subsequently provided from the solicitors he approached would need to be considered by UKI as a fresh complaint.

Mr R didn't agree. He's made detailed comments which I've summarised as follows:

- The requirement for his solicitors to sign terms of appointment had been introduced unilaterally after the policy was taken out and only after the panel firm had a conflict of interest. He wasn't aware of how restrictive these terms were and hadn't agreed to them. He said he shouldn't be bound by them as they constituted unfair terms in a consumer contract and were rendering his right to freedom of choice meaningless.

- He drew attention to case law which he believed supported his position which was that freedom to choose his own solicitor applied in relation to any inquiry or proceedings and that his insurance contract needed to follow that case law.
- He thought it was clear from the information he'd provided that a solicitor's firm would have acted for him if he'd instructed them privately. But if a panel firm had been used a policyholder would not be required to make up front payment which was the case with one of the firms he'd contacted. And so it was UKI's terms of appointment that were preventing him progressing his claim.
- He didn't think he should have to go to the lengths he had to find a law firm prepared to work for him particularly as he was only in that position because UKI's panel firms wouldn't represent him. He thought UKI should settle the professional negligence claim under the economic settlement section of the policy.
- And he thought a decision on this case should in any case await the outcome of a Freedom of Information Act request he'd made to our service.

So I need to reach a decision.

### **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.

I've considered first whether I can fairly progress the decision on this complaint. In doing so I've thought about whether Mr R has had a proper opportunity to understand the basis for the view we've taken on the complaint and provide his response to that. I've also taken into account that our governing legislation (the Financial Services and Markets Act) requires us to resolve complaints quickly and with minimum formality.

I can see Mr R has had the opportunity to provide submissions throughout the progression of his complaint with us including after our investigator's initial view (in November 2023), following a further view in February this year and when he was told the complaint would be moved for decision by an Ombudsman later that month. He's also been provided with redacted correspondence between us and UKI.

Mr R has suggested he needs more time to receive and respond to a Freedom of Information Act request he's made. However, the information he's requested appears to relate to our general approach to changes to policy wording during the policy term and cases where we've decided to depart from the law. I don't think either of those matters are relevant to the outcome I'm reaching on this complaint (for the reasons I'll go on to explain in this decision).

And information about our general approach to legal expenses cases (and our view, for example, of how the law applies to a policyholder's right to choose their own solicitor) is readily available on our website. Our investigator set out in his correspondence with Mr R how he thought that applied in relation to his complaint.

In my view Mr R has the information he needs to understand how our investigator reached his outcome and has been given a reasonable opportunity to provide his comments on that (which he's done). I'm also satisfied I have the information I need to reach a fair decision on this complaint and it's appropriate for me to do so.

In considering the issues Mr R has raised about the claims he made I've taken into account that the relevant rules and industry guidelines say UKI has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.

*Is it fair of UKI to require Mr R's solicitor to sign its terms of appointment?*

Mr R says the requirement for solicitors to agree UKI's terms of appointment was introduced unilaterally after the policy was taken out and so the policy has been changed mid-term. I don't agree with him. I've reviewed the policy terms which applied at the start of the policy period before his claims and they say *"If you choose an appointed representative who isn't a preferred law firm they must agree to act for you in line with our terms of appointment (you can ask us for a copy)"*.

The policy defines 'terms of appointment' as *"A separate contract which we will require the appointed representative to enter into with us if they aren't a preferred law firm. It sets out the amounts we will pay them under your policy and their responsibilities to report to us at various stages of the claim"*. Taking into account relevant case law (*Brown-Quinn & Anor v Equity Syndicate Management Ltd & Anor* [2012] EWCA Civ 1633) I think reference in the policy to the insurer's standard terms of appointment is enough to incorporate them into the insurance contract.

Mr R has argued that's an unfair contract term. And he's quoted from the EU Unfair Terms in Consumer Contracts Directive 1993 in support of his position. However, that directive was superseded by the Consumer Rights Act 2015. So I think its provisions would be the relevant legislation applying in this case.

The Consumer Rights Act (and accompanying guidance) sets out the things that could make a contract term unfair – essentially where a term creates a significant imbalance in the rights of the parties to the detriment of the consumer. But in deciding if a term could be unfair the Act also identifies the need to take into account the subject matter of the contract, all the circumstances existing when the term was agreed and all the other terms of the contract.

Given that context, it's important to note there's no insurance policy which covers everything that may result in a policyholder experiencing financial loss. The provision of insurance is always subject to terms and conditions and these have the effect of limiting the insurer's liabilities to its policyholders. And so such terms are not inherently unfair or unreasonable.

In this case (and in common with other insurers) through the terms of appointment UKI is seeking to limit the amount it will pay where a policyholder appoints their own solicitor under the provisions of their policy. That's in line with relevant case law (*Brown-Quinn* as above) which said a legal expenses insurer has the right to restrict what it would pay to a non-panel solicitor, provided the remuneration is not so low as to render the policyholder's freedom of choice meaningless.

So I don't think it's unreasonable of UKI in principle to include restrictions on the amount it will pay in its terms of appointment. And I don't agree that limiting cover in this way creates a significant imbalance between Mr R and UKI. The terms of appointment don't remove Mr R's right to appoint his own solicitor (which would be contrary to the relevant legislation) but simply limits the amount it will pay for this.

I need to take account of relevant law, rules, guidance and (where appropriate) what I consider to be good industry practice. That doesn't mean I have to apply the law in exactly the same way as a court. Rather, I take these things into account when deciding what's fair and reasonable in all the circumstances of the case. Having considered all the circumstances, in my judgment it's not unreasonable for UKI to limit the amount it will pay for Mr R's own solicitor as long as doing so doesn't render his freedom to choose his own solicitor meaningless.

Nevertheless, it might not be fair to apply that term if it was a significant or unusual feature of the policy that wasn't brought to Mr R's attention in the information UKI was responsible for. However, I'd also need to be satisfied that if Mr R had been aware of that he'd likely have taken out a policy that would have operated in a different way.

I don't think that's the case here. Taking into account the relevant rules, I think a significant or unusual term is one that would affect the decision of customers generally to buy. That might be the case if the terms of appointment significantly restricted cover, for example by offering a fixed hourly rate much lower than a policyholder could normally instruct a non-panel solicitor.

However, in this case the terms of appointment don't set a fixed rate but say "*You agree that Our liability to indemnify Your costs will be based on the hourly rates detailed in the Senior Court Costs Office Guideline Rates for Summary Assessment for the County Court nearest the Insured Person's main address, or Your local office, whichever is the lower*". I don't think that's a restriction which would affect the decision of customers generally to buy given the court guideline rates are a relevant factor we'd consider when deciding whether a business had acted reasonably in determining what a fair rate to pay a non-panel solicitor was.

In addition, even if this term had been brought to Mr R's attention, I've seen no evidence he'd have sought out and been able to find a policy that would have operated in a way that would have been more beneficial to him. And I think it's unlikely he would as legal expenses policies invariably place restrictions on the amount they will pay where a policyholder uses a non-panel solicitor. As a result I don't think it was unfair of UKI to say it would require a non panel solicitor to agree to its terms of appointment.

*Should UKI have allowed Mr R to appoint his own solicitors for his car claim*

Mr R made this claim to UKI in July 2023. It appears that UKI accepted the claim and referred it to a panel solicitor for further assessment. Mr R then said he wanted to use his own solicitor to pursue the matter. And he says the reference to "*any inquiry or proceedings*" in the relevant regulations includes enquiry, discovery and mediation. He believes case law supports his position that the right to choose his own solicitor applies as soon as his cause of action arises.

However, Mr R's policy says "*if it is necessary to take your claim to court, or if there is a conflict of interests, you can choose a law firm to act as the appointed representative*". And the submissions Mr R provided for my consideration don't represent established case law but appear to be the opinion of the Advocate General of the Court of Justice of the European Union. The actual ruling of the court following that was made on 14 May 2020.

Nevertheless, given the date of the ruling I understand that would still be relevant to UK law. And I appreciate as part of its judgement the court did say "*any stage, even a preliminary stage, which is capable of leading to proceedings before a judicial body must be regarded as falling within the term 'proceedings'*". The relevant UK regulations say that under a legal expenses insurance contract an insured shall be free to choose their own lawyer where that's necessary to defend, represent or serve their interest in any inquiry or "proceedings".

But the ECJ judgement related primarily to whether judicial mediation constituted proceedings within the meaning of the relevant directive and how that applied within the member state concerned (which wasn't the UK). So I'm not clear it would have a read across here. Even if it does have a broader application I don't think that's necessarily out of line with our long standing approach to these matters which is that a policyholder should be allowed to choose their own solicitors from the point that legal proceedings need to be started. And that wasn't the case for Mr R's claim.

The position might be different if there were exceptional circumstances that apply to the case or if there was a conflict of interest. But there isn't evidence to show the claim Mr R wanted to bring was, for example, particularly complex. And at the point Mr R asked UKI for the right to choose his own solicitor it doesn't appear there was a conflict of interest. I appreciate the position on that might then have changed but that falls outside of the scope of the complaint I'm considering. I think it was in line with the policy terms and fair of UKI to say Mr R didn't have the right to choose his own solicitor at the point he made that request.

*Did UKI render Mr R's freedom of choice meaningless for his professional negligence claim?*

I understand UKI agreed Mr R could choose his own solicitor for his professional negligence claim. The issue is whether the terms of appointment (which I've already concluded it was entitled to rely on) mean it wasn't possible for him to find a solicitor of his own to progress that claim because the hourly rate UKI was prepared to offer was so low that Mr R didn't, in practice, have a choice of firms he could use. In this case (and in line with the terms of appointment) UKI didn't restrict the amount it would pay to a specific hourly rate but said the amount would be based on the court guideline rates.

As I've already said I think the court guideline rates provide a reasonable starting point when considering whether an insurer has offered a fair hourly rate. And I haven't seen any clear evidence relating to the complexity of Mr R's case which suggests a higher rate should be used. But in order to show it had offered a reasonable rate I'd also expect UKI to be able to show it had claims with similar circumstances where non panel firms had acted under the policy rates without asking the policyholder to pay the difference. And I can see it did provide Mr R with a list of solicitors who had recently agreed to its terms on similar claims. I think UKI has done enough to show it offered a fair rate in this case.

If Mr R was nevertheless able to evidence the hourly rate offered didn't enable him to obtain a solicitor who'd progress his claim it might be reasonable to expect UKI to take further action. And he's provided correspondence he had with the solicitors he approached. However, I've reviewed that and, while one of the firms clearly does have an issue with the hourly rate, other firms don't say their reason for declining to act is because of any concerns about UKI's terms of appointment.

So, on the basis of the evidence available to it, I don't think UKI acted unreasonably in concluding it didn't need to do anything further. I appreciate Mr R has now obtained further evidence on this point, and is seeking to gather more, but that (including the information Mr R provided about one of the firms seeking an upfront fee) isn't something UKI has had an opportunity to review to date. As a result that will need be considered by UKI as part of a fresh complaint.

I appreciate Mr R doesn't feel he should need to go to these efforts to find his own solicitor and he only needed to do so because a panel firm couldn't act. However, the cover provided by his policy is for 'costs' which it defines as "*all properly incurred, reasonable and proportionate fees, expenses and disbursements charged by the appointed representative and agreed by us...*" and "*the fees incurred by your opponent that you are ordered to pay by a court and any other fees that we agree to in writing*".

So it's the legal costs associated with the claim his policy covers; it doesn't provide a solicitor. And while the policy gives UKI the right to appoint a panel firm it doesn't oblige it to offer one.

Mr R also says UKI should settle this claim under the economic settlement section of the policy. The policy does give UKI the right to "*settle your claim by paying you the compensation you are likely to be awarded by a court instead of starting or continuing your claim or legal proceedings*". However, I can't see that's something Mr R has raised in correspondence with UKI and it doesn't feature in the complaint responses it's provided to date. So I think it would also need to have the opportunity to consider any arguments he wants to make on this point before this was something we could consider.

### **My final decision**

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B and Mr R to accept or reject my decision before 23 May 2024.

James Park  
**Ombudsman**