

The complaint

Mr and Mrs C complain about how U K Insurance Limited dealt with their legal expenses claim. Reference to UKI includes its agents.

What happened

The details of this complaint are well known to both parties, so I won't repeat them again here in full. In summary, Mr and Mrs C have home insurance with UKI which includes family legal protection cover. In March 2018, Mr and Mrs C notified UKI of a legal expenses claim in relation to a boundary dispute with their neighbour. UKI accepted the claim and instructed one of its panel solicitors.

In mid 2020, UKI decided that it was no longer willing to fund the case. Mr and Mrs C complained about that. In its final response to Mr C, UKI said that the costs of pursuing the claim were disproportionate. UKI said that it relied on the opinion of its panel solicitors in coming to that decision.

Mr and Mrs C complain that:

- UKI took too long to come to its decision about proportionality – it could have done so in 2018.
- Proportionality is poorly defined in the policy and should include factors such as the defendant's reckless behaviour.
- UKI hasn't provided any evidence to show how it assessed proportionality.
- UKI declined to settle their claim by paying them the compensation they are likely to be awarded by a court and refused to share how it came to that decision.
- The consequences of the boundary dispute remaining unresolved include future difficulties selling their property and an effect on the sale price.

My first provisional decision

On 18 October 2021, I sent both parties my first provisional decision in this case, an extract of which is attached and forms part of this final decision. I said that I'd come to a similar outcome to our investigator but for slightly different reasons. I said that the main issue in this case is about proportionality of the potential legal costs involved and that whilst UKI had good information about the likely legal costs of Mr and Mrs C's claim, it didn't have information about the value of their claim. So, I didn't see how UKI could fairly conclude that the costs are disproportionate.

I said that proportionality isn't simply about the value of the land in dispute but also about the importance of the remedy sought. I intended to direct UKI to instruct and pay for a report from an appropriate expert in relation to the value of the land in dispute and then reassess the value of Mr and Mrs C's claim, taking into account the wider elements of the dispute,

both financial and non-financial, not just the monetary value of the land. I said that UKI may need to seek further legal advice about whether the wider issues are things that are likely to be resolved through litigation. I said that UKI should then reassess whether the likely costs would be disproportionate to the value of the claim.

Both Mr and Mrs C and UKI responded to my first provisional decision. At my request, the investigator contacted Mr and Mrs C to say that the order I intended to make related to the '*Southern Section*', as defined by counsel, as that's where the proportionality issue is relevant. Mr and Mrs C didn't agree.

My second provisional decision

On 13 January 2022, I sent both parties my second provisional decision in this case, an extract of which is also attached and forms part of this final decision. I sought to ensure that both parties have a common understanding of the extent of the order I proposed. I said that the order I proposed to make relates to the "*Southern Section*" of the boundary, as defined by counsel. That's because Mr and Mrs C's complaint is about UKI withdrawing funding on the grounds of proportionality, which relates to the "*Southern Section*".

I said that UKI was entitled to rely on counsel's opinion that Mr and Mrs C's claim in relation to the "*Middle Section*" didn't have reasonable prospects of success.

UKI said that it accepted the second provisional decision. Mr and Mrs C said:

- The following three areas of land should be included in the reassessment of their claim:
 - The part of the "*Middle Section*" which is approximately 14 metres by 1.5 metres, and which isn't affected by counsel's opinion relating to their temporary fence which covered only 16 metres of the total 30 metres of the "*Middle Section*".
 - The land between the centre of the beech hedge and the original fence on their neighbours' side - which their neighbours removed in 2017 - which is at least 60-90cm for the approximate 22 metres of the beech hedge.
 - The 22 feet x 8 feet triangle of land fenced by their neighbours in contravention of the previous settlement agreement.
- The reassessment of their claim should include a component to compensate them for the loss of the beech hedge and the value of their fence which was damaged and removed by their neighbours. An arboricultural ecologist and garden historian should comment on the damage to the beech hedge and its value.
- The unresolved boundary dispute affects the value of their property.
- UKI and its panel solicitors were negligent in telling their neighbours that they intended to start proceedings before counsel's opinion had been sought, which caused them unnecessary distress and uncertainty.
- UKI initially concluded that their claim didn't have reasonable prospects of success and when it changed its position about that, it didn't suggest that the costs were disproportionate.
- UKI missed the opportunity to mediate.

- Their contract is with UKI, not its panel solicitors. UKI instructed its panel solicitors to reassess their claim without waiting for the final decision. It's not appropriate for UKI to use the same panel solicitor to reassess their 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.

It's clear and quite understandable that Mr and Mrs C have strong feelings about this matter. They have provided detailed submissions to support the complaint. I've read through all this carefully and taken it all into consideration when making my decision. I trust that Mr and Mrs C won't take as a discourtesy that I concentrate on what I think are the central issues in the case.

I'm looking at how UKI handled Mr and Mrs C's legal expenses claim. This service can't make a determination on the issues that would be aired at any hearing or trial. And, as I've mentioned before, this service can't deal with criticisms Mr and Mrs C have of the panel solicitors and the same applies to any concerns about counsel. Solicitors and counsel are independent legal experts with their own regulator and complaints bodies.

I've noted what Mr and Mrs C say about the areas of land they think should be included in the reassessment of their claim and the experts they believe should be instructed about the beech hedge. Insurers are able to rely on the legal advice and opinions provided by a suitably qualified lawyer, provided that the advice or opinion are not obviously wholly incorrect when viewed from the perspective of a lay person.

I've looked again at counsel's opinion and addendum opinion in this case. I think that UKI was entitled to rely on counsel's opinion in relation to the general descriptions of the "*Middle Section*" and "*Southern Section*". In using those terms and descriptions, counsel relied on the "*Boundary Demarcation Report*" and went on to consider deeds of conveyance and attached plans, Land Registry documents, what Mr and Mrs C said and the position of the old stake fence in the "*Middle Section*" and the post and wire fence in the "*Southern Section*". I don't think that counsel's separation of the two sections of the boundary was illogical or incorrect such that UKI can't rely on it. So, I don't think that I could fairly direct UKI to include in the "*Southern Section*" the areas of land Mr and Mrs C have mentioned which aren't already included in that section.

It's for solicitors and counsel to decide what evidence they need to support Mr and Mrs C's claim. It's not for UKI to instruct its panel solicitors about what evidence to gather, for example, from an arboricultural ecologist or garden historian.

In my first provisional assessment, I included the effect on the sale price of Mr and Mrs C's property as one of the elements that UKI should consider when coming to a view about the value of Mr and Mrs C's claim.

Mr and Mrs C say that UKI changed its position in relation to their claim. The change they refer to was in Mr and Mrs C's favour. I think it's right that UKI changes its position when new information comes to light. Mr and Mrs C also say that UKI didn't originally suggest that the costs were disproportionate to the value of the claim. Cases evolve as they progress: it may not be clear at the outset that the likely costs of proceeding outweigh the likely benefit. And it's not for UKI to direct proceedings or choose the appropriate route for Mr and Mrs C's claim.

I don't think I can fairly direct UKI to change its panel solicitors in this case at this stage. I appreciate that the panel solicitors contacted Mr and Mrs C about my proposed order before the final decision and have previously reached conclusions with which Mr and Mrs C don't agree, but I've seen no evidence of conduct amounting to a conflict of interest. Subject to the policy terms, if Mr and Mrs C's case reaches the stage where legal proceedings need to be started, they have the freedom to instruct a solicitor of their choice.

I've considered all that's been said but I remain of the view that UKI has good information about the likely legal costs of Mr and Mrs C's claim but doesn't yet have information about the value of their claim, so it can't fairly conclude that the costs are disproportionate. As I said in my first provisional decision, proportionality isn't simply about the value of the land in dispute but also the importance of the remedy sought, which might include elements for damage to their property, trespass, nuisance, the difficulty they may have in selling their property when the new physical boundary doesn't match the title plan at the land registry, the effect on the sale price of their property and the loss of the hedge and its impact on the balance of their remaining garden. These factors may or may not have merit and value, but I think it's right that they are considered when coming to a view about the value of Mr and Mrs C's claim about the "*Southern Section*".

For the reasons set out above and in my provisional decisions, I remain of the view that UKI should instruct and pay for a report from an appropriate expert in relation to the value of the land in dispute in the "*Southern Section*" as defined by counsel – "*...that portion running south approximately in line with the Beech Hedge to where it meets the previously agreed southern boundary in the Settlement Agreement dated 11 May 2015*". UKI should then reassess the value of Mr and Mrs C's claim, taking into account the wider elements of the dispute, both financial and non-financial. UKI may need to seek further legal advice about whether the wider issues are things that are likely to be resolved through litigation. UKI should then reassess whether the likely costs would be disproportionate to the value of the claim.

UKI didn't assess appropriately the proportionality issue here. That no doubt caused Mr and Mrs C distress and inconvenience. I think that fair compensation for that is £200.

Putting things right

In order to put things right, U K Insurance Limited should instruct and pay for a report from an appropriate expert in relation to the value of the '*Southern Section*', as defined by counsel, then reassess the value of Mr and Mrs C's claim, bearing in mind the wider impacts of the ongoing dispute, both financial and non-financial, not just the monetary value of the land. It should then reassess whether the likely costs are disproportionate to the value of the claim. In addition, I propose to direct UKI to pay Mr and Mrs C compensation of £200 in relation to their distress and inconvenience.

My final decision

My final decision is that I uphold Mr and Mrs C's complaint. I now direct UK Insurance Limited to take the steps I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C and Mr C to accept or reject my decision before 23 March 2022.

An extract from my first provisional decision of 18 October 2021

"In this decision, I don't deal with the criticism Mr and Mrs C have of the panel solicitors. That's because this service has no jurisdiction over solicitors, and we don't hold insurers responsible for the actions of panel solicitors. UKI appoint panel solicitors as independent legal experts with their own regulator and complaints body. But I can consider how UKI dealt with Mr and Mrs C's insurance claim.

the relevant policy terms and conditions

The starting point is the terms and conditions of the policy, the relevant parts of which say as follows:

"Conditions and losses not covered

[...]

Economically settling your claim

We can decide 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. If **your** claim is not for damages, **we** may decide to settle **your** claim by paying **you** the equivalent financial value of **your** claim.

If costs become disproportionate

We can refuse to pay further **costs** if **we** or the **appointed representative** consider that those **costs** would be disproportionate to the value of the claim."

has UKI acted unfairly in withdrawing cover or in its handling of the claim?

The relevant rules and industry guidance say that UKI has a duty to handle claims promptly and fairly and it shouldn't reject a claim unreasonably.

- Where an insurer seeks to rely on an exclusion in the policy, the onus is on the insurer to show how that exclusion applies and that it acted fairly and reasonably in relying on it.*
- The main issue in this case is about the proportionality of the potential legal costs involved. This is important because, as I've set out above, UKI's policy has a proportionality test that has to be satisfied for cover to continue. This sort of test isn't unusual in legal expense insurance. I wouldn't expect insurers to fund claims if the likely costs are disproportionate to the value of the claim. And I wouldn't expect privately paying individuals to do so either. So, I don't think that it's necessarily unfair for UKI to seek to rely on that exclusion.*
- The policy doesn't define what is meant by "disproportionate". In the ordinary, everyday meaning, it's something that's too large or too small in comparison with something else. So, it involves two values. Here, we're considering i) the likely legal costs as against ii) the value of the claim.*
- Counsel's opinion in this case is that a possession claim of this sort would cost between £40,000 to £60,000 and that the amount of useable land that Mr and Mrs C have lost as a result of the action of their neighbours is a few inches wide, so it would be disproportionate to fund litigation in order to recover possession of the land. Counsel subsequently provided an addendum opinion in which he said, amongst other things, that Mr and Mrs C's claim would cost at least £40,000 and that he'd remain of the view that the costs were disproportionate if the costs were £30,000 to £40,000.*

- *UKI has good information about the likely legal costs of Mr and Mrs C's claim but, based on what I've seen, it doesn't have information about the value of their claim. So, I don't see how it could fairly conclude that the costs are disproportionate. In general terms, UKI is entitled to rely on their legal experts but in this case I think that the advice it has doesn't deal with the value of Mr and Mrs C's claim.*
- *In cases like the one here, proportionality isn't simply about the value of the land in dispute but also the importance of the remedy sought. In effect, Mr and Mrs C say that their claim isn't just about the value of the land in dispute but also about damage to their property, trespass, nuisance, the difficulty they may have in selling their property when the new physical boundary doesn't match the title plan at the land registry, the effect on the sale price of their property and the loss of the hedge and its impact on the balance of their remaining garden. There may or may not be merit in these points, but I think it's right that they are considered when coming to a view about the value of Mr and Mrs C's claim.*
- *In order to put matters right, UKI should instruct and pay for a report from an appropriate expert in relation to the value of the land in dispute. UKI should then reassess the value of Mr and Mrs C's claim, taking into account the wider elements of the dispute, both financial and non-financial. UKI may need to seek further legal advice about whether the wider issues are things that are likely to be resolved through litigation. UKI should then reassess whether the likely costs would be disproportionate to the value of the claim.*
- *Nothing I've seen supports the view that UKI should have refused to cover the claim at the outset, as Mr and Mrs C seem to suggest. Neither UKI nor the panel solicitors would know at the outset how the case was likely to proceed, so they wouldn't have a meaningful idea of the likely costs. But UKI didn't assess appropriately the proportionality issue here, which no doubt caused Mr and Mrs C distress and inconvenience. I think that fair compensation for that is £200.*
- *The policy entitles UKI to settle the claim by paying the amount in dispute – known as a "bagatelle payment". An insurer typically chooses to settle a claim by making a bagatelle payment for commercial reasons, usually because the likely costs outweigh the amount in dispute. UKI isn't obliged to make a bagatelle payment to Mr and Mrs C but we'd expect it to exercise its discretion in this matter fairly.*
- *UKI says that it won't make a bagatelle payment here because an economic settlement isn't appropriate, as the remedy Mr and Mrs C claim isn't a monetary one. And it says that sort of payment isn't usually relevant in boundary disputes. In addition, it follows from what I've said above that UKI don't yet know the value of Mr and Mrs C's claim. In all the circumstances, I don't think that UKI acted unfairly in declining to make a bagatelle payment.*

My provisional decision

My provisional decision is that I intend to uphold Mr and Mrs C's complaint. I intend to direct U K Insurance Limited to instruct and pay for a report from an appropriate expert in relation to the value of the land in dispute, then reassess the value of Mr and Mrs C's claim, bearing in mind the wider impacts of the ongoing dispute, both financial and non-financial, not just the monetary value of the land. It should then reassess whether the likely costs are disproportionate to the value of the claim. In addition, I propose to direct UKI to pay Mr and Mrs C compensation of £200 in relation to their distress and inconvenience."

An extract from my second provisional decision of 13 January 2022

"In this second provisional decision, I'm seeking to ensure that both parties have a common understanding of the extent of the order I propose. I intend to uphold Mr and Mrs C's complaint and to direct UKI to take certain steps in relation to the "Southern Section", as defined by counsel. I'll explain why:

- Mr and Mrs C's complaint is about UKI withdrawing funding on the grounds of proportionality. The proportionality issue relates to the section of the boundary counsel referred to as the "Southern Section" in his initial opinion in February 2020 and which he described as "...that portion [of the boundary] running south approximately in line with the Beech Hedge to where it meets the previously agreed southern boundary in the Settlement Agreement dated 11 May 2015." Counsel said whilst there are good prospects – later reduced to moderate – of persuading the court that the boundary is along the centre line of the beech hedge, the costs are disproportionate to the useable land that Mr and Mrs C have lost.*
- The report I intend to direct UKI to obtain from an appropriate expert is in relation to the "Southern Section", as defined by counsel, as that's where the proportionality issue is relevant and in relation to which I don't think that UKI had sufficient information to make a fair and reasonable decision. If Mr and Mrs C accept a final decision along those lines, UKI will be bound to obtain the report as directed, then reassess the value of the claim in relation to the "Southern Section".*
- Counsel said that Mr and Mrs C's claim in relation to the "Middle Section" – '... that part of the boundary running diagonally south from the brick wall that forms the northern part of the eastern boundary to the northern edge of the tall series of beech trees forming a hedge...' didn't have reasonable prospects of success. He said that the court would likely find that the boundary was formed by the fence Mr and Mrs C erected in 2014 and not further east than that. I've noted what Mr and Mrs C say in response to counsel's conclusions about the middle section.*
- Like every legal expenses policy, UKI will only cover Mr and Mrs C where their claim has reasonable prospects of success. This is described as being better than a 50% chance that Mr and Mrs C will obtain a successful judgement and recover losses or damages or other legal remedy, including enforcement. And reasonable prospects must remain for the duration of the claim. It's unreasonable to expect legal costs to be incurred for a case that has little chance of success, whether paid privately or by an insurer.*
- We'd expect UKI to obtain legal advice when assessing reasonable prospects and that's what it did here. Counsel said that Mr and Mrs C's claim in relation to the middle section didn't have reasonable prospects of success. UKI asked counsel for a further opinion and put Mr and Mrs C's additional documentation to him. But counsel didn't change his view about the prospects of success in relation to the "Middle Section".*

- *I think that UKI was entitled to rely on counsel's opinion about the prospects of success of Mr and Mrs C's claim in relation to the "Middle Section". The policy provides that where there are conflicting opinions over reasonable prospects of success, it's for Mr and Mrs C to obtain an opinion from an agreed choice of barrister. Mr and Mrs C will bear the cost of that unless it shows that the claim has reasonable prospects of success. So, if Mr and Mrs C wish to pursue the claim in relation to the "Middle Section", their next step is to instruct an agreed choice of barrister in relation to their prospects of success.*

My response to UKI's comments on my first provisional decision

- *I remain of the view that UKI didn't have sufficient information about the value of the claim in relation to the "Southern Section" before it came to its view about the proportionality of the costs.*
- *I appreciate that a surveyor's valuation may not take into account the wider elements of Mr and Mrs C's claim in relation to the southern boundary. That's why I intend to instruct UKI to obtain a report in relation to the value of the land, then reassess the value of the claim taking into account the wider elements of the dispute.*
- *UKI's panel solicitors have now given some consideration to the wider elements of the claim. It says that there might be trespass and partial loss of the hedge but don't suggest what remedy might be available for that. The panel solicitors say that the ongoing impact of the trespass is minimal but don't quantify that. It remains the case that UKI don't have information about the value of Mr and Mrs C's claim in relation to the "Southern Section". And UKI didn't consider those issues adequately or at all before coming to its view on proportionality.*
- *UKI says that it has seen no evidence that the loss of the land has devalued Mr and Mrs C's property, but it didn't consider that point before coming to its view on proportionality.*
- *As I said in my first provisional decision, in general terms, UKI is entitled to rely on its legal experts but in this case I think that the advice it had before coming to its view on proportionality in relation to the "Southern Section" didn't deal with the value of that part of Mr and Mrs C's claim.*

My response to Mr and Mrs C's comments on my first provisional decision

- *For the reasons I explained in my first provisional decision, I don't comment on Mr and Mrs C's concerns about the conduct of the panel solicitors or counsel.*
- *I think UKI was entitled to rely on its panel solicitors and counsel to choose the most suitable venue for Mr and Mrs C's claim and to consider the "Southern Section" and "Middle Section" separately. There're different considerations in relation to each section and it seems to me entirely logical to consider them separately. I don't think there was any obligation on counsel to consider both sections together when considering proportionality.*
- *Based on what I've seen, UKI didn't delay in dealing with the claim. A complaint about the solicitor's delay in this matter should be directed to them.*

- *I've seen no evidence that UKI are funding Mr and Mrs C's neighbours' claim or, if it is, that it's affected UKI's decisions in this case. I think that UKI took the steps it usually takes but fell short in one aspect, that is, it didn't have sufficient information about the value of the claim in relation to the "Southern Section" before coming to its view on proportionality.*
- *Mr and Mrs C have asked about the next steps. If Mr and Mrs C accept a final decision along the lines I propose, UKI will be bound to obtain a report from an appropriate expert in relation to the value of the land described as the "Southern Section" by counsel, then reassess the value of the claim as directed. UKI's panel solicitors have now given some consideration to the wider elements of the claim but it will need to consider the wider elements of the claim again with the new information UKI will have about the value of the land. If, following reconsideration of proportionality in relation to the "Southern Section", UKI reaches a decision which Mr and Mrs C think is unfair, they should first complain to UKI about that and, if they are not satisfied with its response, they could complain to this service about the new decision. But matters dealt with in this decision won't be revisited in any future complaint.*

My second provisional decision

My second provisional decision is that I intend to uphold Mr and Mrs C's complaint. I intend to direct U K Insurance Limited to instruct and pay for a report from an appropriate expert in relation to the value of the 'Southern Section', as defined by counsel, then reassess the value of Mr and Mrs C's claim, bearing in mind the wider impacts of the ongoing dispute, both financial and non-financial, not just the monetary value of the land. It should then reassess whether the likely costs are disproportionate to the value of the claim. In addition, I propose to direct UKI to pay Mr and Mrs C compensation of £200 in relation to their distress and inconvenience."

Louise Povey
Ombudsman