

The complaint

Mr M complains that U K Insurance Limited ("UKI") failed to pay his costs in full under a legal expenses insurance policy.

Where I refer to UKI, this includes its agents and claims handlers.

What happened

The detailed background to this complaint is well known to both parties. So, I'll only provide an overview of some key events here.

Mr M made a claim under his legal expenses insurance policy to contest his late mother's will. A barrister's opinion was sought which concluded that a claim under the Inheritance Act had reasonable prospects of being successful but claims for mirror wills or capacity were unlikely to succeed due to a lack of evidence.

Based on this advice, UKI agreed to cover a claim under the Inheritance Act only. It agreed terms of appointment with Mr M's chosen solicitor and cover was put in place.

Following negotiations, the defendant made an offer to settle for £65,000. This was in response to Mr M's solicitor making a Part 36 offer for this sum. The solicitor was of the opinion that the offer was reasonable and should be accepted. They said the prospects of achieving higher would be slim to none and there was a risk that Mr M could be awarded less or lose if the matter proceeded to trial.

The solicitor contacted UKI and asked for its agreement to settle the claim for £65,000 on the basis that UKI would meet the legal costs incurred for the Inheritance Act claim, which amounted to £15,020.70.

UKI said that the costs incurred had exceeded the amount authorised under the policy. The terms of appointment stated that a reserve would be made for costs and the solicitor should request, in advance, increases to the reserve when needed. Despite this, UKI agreed to cover the costs subject to an assessment by a cost draftsman, rather than restricting them to the reserve in order for Mr M to accept the settlement offer.

The solicitors subsequently submitted their costs to UKI, which amounted to £27,040.40. It appears the costs previously notified to UKI didn't include work associated with accepting the offer and concluding the claim or disbursements. I believe costs of liaising with the cost draftsman have also been added.

UKI has agreed to pay £15,020.70 in full and final settlement, leaving the remainder of the solicitor's costs unpaid. The solicitors are unwilling to release Mr M's settlement of £65,000 to him until their costs have been paid in full. So Mr M has raised a complaint which he's brought to our service.

Our investigator identified an error in the solicitor's email to UKI when it initially set out their costs. He said it's clear this should've said £16,888.80 rather than £15,020.70, because

otherwise the breakdown provided didn't add up correctly. It's for this reason that he thought it was fair for UKI to pay an additional £1,861.10 plus 8% simple interest. He didn't think UKI needed to pay any more than this.

Mr M didn't agree, so the complaint was passed to me. I issued a provisional decision, which said:

"It's not in dispute that UKI and the solicitors entered into terms of appointment which made clear that costs should be authorised in advance in order for a "reserve" to be set against the claim. The solicitors failed to do this, but it appears that UKI agreed to waive that condition in the interest of settling the claim.

The solicitors told UKI that their costs amounted to £15,020.70 – which UKI agreed to pay. I agree with our investigator that there is an obvious error here, as the solicitors provide a breakdown of retrospective costs amounting to £5,680.20 inclusive of VAT and their WIP to date of £11,208.60 inclusive of VAT. I think it's reasonable to expect UKI to have noticed the discrepancy here, so I think it's fair to ask it to pay the additional £1,861.10.

I've thought about whether it's fair for UKI to pay anything more than this. And my provisional answer is that it should. I'll explain why.

Starting with the disbursements, I think it's clear the solicitor's email didn't include these. I say this because it only made reference to their costs and WIP. The legal expenses policy covers both costs and disbursements, therefore if there are disbursements that have been reasonably incurred for the Inheritance Act claim during the time that the policy cover was in place, it's fair that the policy pays these.

I do appreciate that UKI has been reasonable in agreeing costs that it didn't authorise within its reserve. But I'm persuaded that had the solicitor's email set out the disbursements also, UKI would've agreed to these in the interests of settling the claim.

I understand that the solicitors incurred costs after giving UKI their "grand total". They did so without prior consent from UKI and I think their previous email where they say legal costs would be "stemmed now" implies there would be no further costs incurred.

That said, UKI gave its permission for the defendant's offer to be accepted and work needs to be done in order for that to happen. So whilst the solicitors weren't clear on what their future costs would be nor did they seek approval for them, it's not reasonable for UKI to expect the solicitors to work for free to bring the claim to a conclusion.

I'm mindful that UKI would've withdrawn cover if Mr M had decided not to accept the offer, as the legal advice was that the offer was reasonable and there were insufficient prospects in achieving a higher award. But in situations like this, we do expect the policy to meet the costs of accepting the offer and bringing the claim to a conclusion, provided that those costs are reasonably incurred.

I'm not persuaded that costs incurred from liaising with UKI or the cost draftsman are met by the policy terms. The cover is in place to pursue a legal claim. I can see that the terms of appointment state the following:

"Our liability for costs...costs you incur in corresponding with Us at times other than those outlined in the reporting requirements as set out in schedule 1 shall not be recoverable from the insured person or from Us."

Based on this, I think it's fair that such costs are excluded, but the exact details of that are a

matter for the cost draftsman.”

Responses to my provisional decision

UKI accepted my provisional decision and had nothing further to add. Mr M has advised that he has paid the solicitor's costs and disbursements. He's also asked for clarification that my instructions to UKI include payment of VAT.

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.

As neither party had any further submissions for my consideration, I see no reason to deviate from the outcome explained in my provisional decision.

My final decision

I uphold this complaint and direct U K Insurance Limited to obtain a cost draftsman's assessment on the remainder of the solicitor's fees with the direction to pay the following:

- reasonably incurred disbursements including VAT, for the Inheritance Act claim only, during the time that policy coverage was in place including any other disbursements agreed and authorised by UKI.
- reasonably incurred legal costs including VAT to accept the defendant's offer and conclude the claim.

Mr M says he has already paid these fees himself. As such, I direct U K Insurance Limited to reimburse Mr M directly in addition to paying 8% simple interest* per annum from the date he paid the costs and disbursements to the date he's reimbursed. UKI are entitled to ask Mr M for proof of payment should it consider it necessary.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 26 April 2022.

*If UKI considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr M how much it's taken off. It should also give Mr M a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Sheryl Sibley
Ombudsman