

The complaint

Mr C complains about the way Fairmead Insurance Limited (Fairmead) have handled the appointment of solicitors to act on his behalf under his legal expenses insurance (LEI) policy.

Where I refer to Fairmead in this decision, I am also referring to their claims handlers.

What happened

Mr C has LEI with Fairmead. They accepted his claim for cover in relation to a legal dispute which he made in April 2018. In August 2021 another ombudsman at the Financial Ombudsman Service decided Fairmead should allow Mr C to appoint his own solicitors to act on his behalf, subject to Fairmead agreeing terms of appointment with them.

Mr C complains Fairmead is wrongly insisting on his solicitors accepting their terms and conditions, which his policy doesn't allow. He says Fairmead tried to impose a conditional fee agreement (CFA) which the policy doesn't require. Mr C's unhappy Fairmead wouldn't accept the judgment of his solicitors about the complexity of his legal case and the expertise required to manage it. He said the hourly rate they offered the solicitors restricted his choice of solicitor. And he's unhappy Fairmead won't agree to make interim payments to his solicitors for their fees. Overall Mr C thinks Fairmead have prevented his claim from progressing and intimidated him.

Fairmead said they were asking Mr C's solicitors to accept their standard terms and conditions in line with the terms of his policy. They confirmed they wouldn't require Mr C to enter into a CFA with his solicitors. And they explained the provisions about costs they required the solicitors to agree clarified the provisions about costs in his policy. Fairmead said they were allowed to negotiate a reasonable hourly rate with his solicitors. They wouldn't agree to pay the solicitors' fees on an interim basis but offered to fund disbursements subject to certain conditions. And they said if the proposals they'd made weren't acceptable to Mr C's solicitors, he'd need to appoint another firm. Fairmead acknowledged they'd delayed in contacting Mr C's solicitors and offered him compensation of £150 for the inconvenience that had caused him.

Mr C didn't accept Fairmead's response to his complaint, so he brought it to the Financial Ombudsman. Our investigator thought Fairmead had acted within the terms of the LEI policy and that the £150 they'd offered Mr C was fair to compensate him for their delays. Since Mr C didn't agree, his complaint was passed to me to decide. I recently issued a provisional decision, an extract of which follows:

What I've provisionally 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 can understand Mr C's concerned about how long his legal case is taking. And I acknowledge his strength of feeling about the way Fairmead has acted since the previous ombudsman's decision in August 2021. I can see there was a delay in Fairmead paying the compensation the ombudsman awarded, although I am pleased to see it's now been paid. I can't get involved in the earlier complaint. My decision addresses only the concerns Mr C's raised about what's happened since.

Mr C's provided a lot of detailed information which has helped my understanding of his complaint. I don't set it all out here. No discourtesy is intended by that. It simply reflects the informal nature of the service we provide. I've taken into account everything he and Fairmead have told us in reaching a provisional decision I think is fair and reasonable in all the circumstances.

In summary, Mr C's key concerns are as follows:

- *Fairmead have wrongly tried to impose their standard terms and conditions in relation to the appointment of solicitors on Mr C's solicitors. The policy doesn't allow for that.*
- *The agreement Fairmead seek to agree with the solicitors has the effect of a CFA by limiting the costs Fairmead will pay the solicitors in certain situations. The policy says a CFA is not a requirement for non-panel firms of solicitors.*
- *The hourly rates Fairmead initially proposed and subsequently tried to negotiate with his solicitors are unreasonable and outside the terms of the policy, which said they'd pay reasonable fees.*
- *Fairmead have tried to impose their own judgment as to the complexity of the case, the level of fee earner required to deal with it and the hourly rate they should pay; as experienced professionals, the opinion of Mr C's solicitors on these issues should take precedence.*
- *Fairmead have refused to make interim payments of fees. Mr C says the policy provides for interim fees to be made and website information suggests Fairmead will fund the reasonable costs and expenses necessary to "run" a policyholder's case.*
- *Fairmead have intimidated Mr C by, amongst other things, repeatedly saying he'd have to appoint alternative solicitors if their terms and conditions aren't agreed.*

Insurer/solicitor agreement

I agree with Mr C that his policy doesn't provide for Fairmead to impose their standard terms and conditions on solicitors who are appointed to represent him. So their standard terms and conditions don't form part of the insurance contract and Fairmead can't require them to be put in place.

But it is standard industry practice for insurers to enter into direct agreements with solicitors who are appointed to act on a policyholder's behalf under a LEI policy. It's not unreasonable for a LEI insurer to want clarity on key issues such as reporting and fee arrangements. It's reasonable for them to monitor whether policy cover continues to apply as a case progresses. And it wouldn't be fair to expect an insurer to become responsible for paying fees over which they have no control and for which they have potentially unlimited liability.

So, it's fair for Fairmead to put an agreement in place with Mr C's solicitors. And the previous ombudsman's decision envisaged they would do so. The issue is whether the terms and conditions Mr C complains about are compatible with the terms of the policy and fair and reasonable for Mr C.

Fairmead confirmed in their response to Mr C's complaint that they wouldn't require a CFA to be put in place between Mr C and his solicitors. But I don't think that addresses Mr C's concerns which are that the standard terms and conditions limit the amount of costs Fairmead might pay the solicitors, potentially leaving him liable for any shortfall.

The policy says Fairmead will pay "costs" up to a limit of £50,000 to pursue a legal action. "Costs" are defined in the policy as

" i) all reasonable and necessary costs charged by the [solicitors] on a standard basis or in accordance with the Predictable Costs scheme if this is appropriate; and

ii) all reasonable and necessary fees and expenses [Mr C is] ordered to pay or [has] agreed to pay with [Fairmead's] prior written agreement;

where these fees and expenses cannot be recovered elsewhere and have been agreed in writing by [Fairmead]".

Fairmead are only liable to pay "reasonable and necessary" costs, and the policy allows Fairmead to have them assessed to check they are. The policy only covers "standard costs" or those incurred under the predictable costs scheme. So, if, for example, costs were awarded against Mr C on an indemnity basis, there may be a balance Mr C would have to meet himself. Fairmead's liability to pay Mr C's legal costs is also limited to those costs he can't recover (irrecoverable costs) up to the £50,000 policy limit.

My understanding of clauses 2.3 to 2.6 of the standard terms and conditions Fairmead want to agree with the solicitors is that they limit the costs Fairmead will pay so that they won't be liable for any irrecoverable costs, save at their discretion. That's incompatible with the terms of the policy. Unless Mr C's liability to the solicitors is limited in the same way – under a CFA, for example - he'd remain liable to pay them any shortfall in their fees that Fairmead don't pay. Whilst Mr C would be entitled to be paid irrecoverable costs in line with the policy terms, he'd potentially have the inconvenience of resolving payment of fees with his solicitors direct.

Of course, that situation hasn't arisen yet, so Mr C hasn't suffered any loss. And, ultimately, it's for Fairmead to decide what to include in the agreement with the solicitors so I won't direct them to make any changes. But they should consider if any changes are required to the costs provisions in the proposed agreement to check they are compatible with the policy.

Hourly rates

General condition 4 of the LEI policy says, broadly, that where Mr C is allowed to appoint his own solicitors, Fairmead will not pay more than they would have paid one of their panel solicitors. But the policy doesn't set out the hourly rate, so Mr C isn't obliged to accept a particular figure under the insurance contract.

Fairmead initially offered Mr C's solicitors £100 an hour. They explained that was the discounted rate they'd agreed with their panel solicitors. I think £100 an hour is likely to reflect, in part, the volume of work Fairmead sends their panel firms and their wider commercial relationships. Mr C has produced a list of fees charged by one of the panel firms previously involved in his case. He said £100 was paid in unsuccessful cases and Fairmead paid higher rates on successful cases. The standard terms and conditions suggest that's probably right since they say £100 an hour may be paid where a case is unsuccessful, or

costs aren't recovered. I haven't seen any conclusive evidence on the point, but I don't think it matters, as I'll explain.

Case law says an insurer may restrict the fees they pay a non-panel solicitor as long as what they pay isn't so low as to render the policyholder's freedom of choice of solicitors meaningless. And the policy says Insurers will pay "reasonable" legal costs on the basis I've set out above.

We'd expect a LEI insurer to offer a fair hourly rate that takes into account factors such as the nature of the legal case and court guideline hourly rates for the solicitors involved and the area in which the work is being carried out. I think the £100 offered initially was unreasonable. The court Guideline Hourly Rates published at the time for solicitors in the relevant area were higher, even for the lowest level of fee earner. So, I think Mr C's freedom of choice was rendered meaningless as a result. But I'm pleased to see Fairmead subsequently considered things on the basis we'd expect.

Mr C's unhappy Fairmead didn't accept his solicitors' view as to the level of fee earner required to handle his legal case and the rate they should be entitled to charge. But I think Fairmead fairly considered the information available as to the complexity and value of the claim and asked Mr C's solicitors for an explanation. Based on that, I think they fairly offered to pay a rate of £198 in October 2021 when the solicitors were asking for £201 plus VAT in August. I can see they negotiated further and most recently increased the rate they'll pay to £216 plus VAT, a blended rate of grade A and C fee earners under more recently published Guideline Hourly Rates. Since that is close to the figure the solicitors will accept - £236.50, a blended rate of Grade A and B fee earners - Mr C's said he would be prepared to pay the difference.

In the end, I think Fairmead have made a fair offer. And I think the compromise proposed is a fair way to resolve this issue. But Fairmead should have made a more reasonable offer initially. I think their failure to do so has contributed to the delay in agreeing terms and progressing the legal claim.

Time for payment of the solicitors' fees

Mr C says the effect of general conditions 5 and 10 of his LEI policy is that Fairmead should pay fees they've authorised once they'd been invoiced. He says cover is provided to "pursue" a case, and website information says costs will be paid to "run" a case, which imply costs will be paid as the case goes along. Fairmead say the combined effect of general conditions 5 and 10 of the LEI policy is that solicitors' charges are paid at the conclusion of the case.

The effect of general condition 5 is that Fairmead won't be responsible for any fees they haven't authorised in advance. It doesn't imply they'll pay those fees once they've been incurred and invoiced. It simply means that if they aren't pre-authorised, they won't be paid at all. General condition 10 explains Fairmead can have the solicitors' costs assessed to check if they are reasonable and necessary before they pay them. It doesn't address when Fairmead should pay them.

It's not uncommon for LEI policies to provide for legal fees to be paid at the end of a case and we don't generally consider it to be unfair. Since costs and expenses are usually assessed at the end of a case, and it's possible costs will be recovered from the opponent, the irrecoverable costs insurers are responsible for won't be known until then.

I acknowledge the impact on Mr C is that he'll need to fund his solicitors' fees as his legal claim progresses unless they will agree not to bill him on an interim basis. I'm not

aware Mr C will be unable to pay their fees. So, based on what I know so far I don't think it would be fair to require Fairmead to pay the solicitors' fees on an interim basis. I note they've agreed to fund disbursements on a quarterly basis subject to certain conditions. I think that's fair. And whilst I understand Mr C has proposed to his solicitors he'll pay their fees, as well as disbursements, on a quarterly basis, that's a matter for him.

Distress and inconvenience

I acknowledge Mr C's been trying to progress his legal claim. I can understand it's been frustrating Fairmead weren't able to come to an agreement with his solicitors about their costs sooner. I think Fairmead could have moved things along more quickly if they'd made a reasonable initial offer on hourly rates. And they've accepted they delayed initially in progressing things after the previous ombudsman's decision.

I can understand why Mr C has found some of Fairmead's comments upsetting. He's argued strongly they need to review their terms and conditions regarding payment of costs. And he's spent a great deal of time and effort communicating with Fairmead. Fairmead's response has generally been that Mr C would need to appoint alternative solicitors if their terms and conditions aren't agreed as drafted. I can understand Mr C has found their approach unreasonable.

Fairmead made reasonable efforts to agree terms with Mr C's solicitors, as I'd expect, before Mr C unusually took over the negotiations. And they have compromised by offering to pay disbursements on an interim basis. But I don't think they fully understood or addressed Mr C's concerns about provisions in the standard terms and conditions that looked like a CFA, which added to Mr C's frustration.

On balance, to reflect the impact on Mr C of the delays and responses to his concerns, I think it's fair for Fairmead to pay him compensation of £250 for distress and inconvenience, inclusive of the £150 they've already offered.

My provisional decision

To put things right I intend to direct Fairmead Insurance Limited to consider whether any changes are needed to the costs provisions in the standard terms and conditions they wish to agree with the solicitors, so they are compatible with the LEI policy; and pay Mr C £250 compensation for distress and inconvenience.

Developments

Both Mr C and Fairmead responded to my provisional decision. Fairmead said on the one hand they accepted it, but on the other that a decision about whether to consider changing the policy wording needed to be made by underwriters. Mr C didn't accept my provisional decision. He set out some detailed arguments, which in large part reiterated points he'd raised previously. In summary he said:

- Fairmead weren't allowed under the LEI policy or legislation, and it wasn't fair, to put an agreement in place with his solicitors, even in modified form
- The policy already requires Mr C to instruct his solicitors to provide Fairmead with updates and contains provisions to control legal costs, so nothing further is needed
- The standard terms and conditions seek to make his solicitors accountable to Fairmead, which would impact the solicitors' professional duties to him as their client and change the effect of his insurance contract - making it a CFA and limiting the costs contrary to the £50,000 policy limit

- The policy is unclear about the hourly rate Fairmead will pay, so it's fair and in line with the Consumer Rights Act 2015 the rate should be determined in favour of his solicitors, not Fairmead
- For the same reason, it's right Fairmead should make interim payments. It's unfair to Mr C not to take into account that smaller non-panel firms, like the one he wishes to use, need to be paid on an interim basis as it unfairly restricts his choice of solicitor
- The provisional direction I made about Fairmead considering changes to the standard terms and conditions to make it compatible with the policy wasn't sufficiently clear. It would be more appropriate for Fairmead to prepare a revised agreement to "fill in any identifiable gaps in the existing" policy. In addition to costs, other clauses in the standard terms and conditions imposed restrictions that didn't appear in the policy, such as Clause 1.4 concerning reasonable prospects of success. A time limit for making any changes should be set
- I didn't take into account fully that Fairmead had deliberately misrepresented the effect of the standard terms and conditions and tried to impose a CFA

I'll address the parties' comments below.

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.

For the reasons I explained in my provisional decision, I don't set out all the arguments Mr C has raised here. But I'd like to reassure him I've considered everything he's said.

Mr C's made several points by reference to the Consumer Rights Act 2015, contract law and guidance set out on the Financial Ombudsman website about how we approach complaints about LEI. The Act wouldn't apply to any agreement between Mr C's solicitors and Fairmead as two businesses. And only a court can determine if a term in Mr C's LEI policy is unfair. But I've taken relevant legislation, law, rules, guidelines and industry best practice into account when weighing up what I consider to be fair and reasonable - to both parties - in the circumstances of Mr C's complaint, which is the basis on which I must come to my decision.

Mr C's raised issues about whether Fairmead gave their claims handler permission to put the standard terms and conditions in place. He's unhappy Fairmead haven't responded to questions about that. And he's questioned whether Fairmead have breached Financial Conduct Authority principles. These issues aren't part of his current complaint, so I don't address them here.

Mr C's referred to a decision made by another ombudsman in relation to a complaint made by another customer to support his case. I make my decision based on the individual circumstances of Mr C's complaint, not by reference to previous decisions.

I'll comment using the same headings I used in my provisional decision.

Insurer/solicitor agreement

As I said in my provisional decision, the previous ombudsman decided in August 2021 that Mr C could appoint his own solicitors. In case there's any confusion about what the previous ombudsman said, I quote from his decision as follows:

“I think it would be appropriate for Fairmead now to allow Mr C to appoint his own solicitors to deal with the matter. It [Fairmead] will of course be entitled to agree terms with that solicitor in relation to, for example, the hourly rate to be paid”;

“...I made it clear in my provisional decision that Fairmead would be entitled to agree terms with Mr C’s solicitor and he accepted what I said on that basis”;

“it remains my view that in this case it would be appropriate for Fairmead to allow Mr C to instruct his own solicitor (subject to normal terms of appointment) if that’s what he wants to do”; and

“Fairmead Insurance Limited will need to put things right by allowing Mr C to appoint his own solicitor to deal with the matter (subject to agreeing terms with that solicitor in relation to, for example, the hourly rate to be paid)”.

I’ve considered Mr C’s points as to why it’s not necessary or fair, given the terms of the insurance policy, contract law and legislative provisions he’s referred to, for there to be a separate agreement between Fairmead and the solicitors. And I note his point that the previous ombudsman’s reference to *“normal terms of appointment”* meant the terms set out in the policy itself.

But I am not deciding whether Fairmead can agree terms separate to the terms set out in Mr C’s contract of insurance with Fairmead as the previous ombudsman decided they can. I am looking at the complaint Mr C made to Fairmead following the previous ombudsman’s decision in August 2021 and before he brought this complaint to us in mid-October 2021 following Fairmead’s response.

In my provisional decision I said Fairmead should consider if any changes are required to their standard terms and conditions relating to costs so that they don’t conflict with the policy terms. Mr C’s concerned that gives Fairmead too much leeway. But he hasn’t demonstrated he’s suffered any loss. So, on reflection, I won’t require Fairmead to consider or make changes. If, in the future, Mr C could show he’s been disadvantaged by any terms Fairmead agreed with the solicitors, he’d be able to raise a fresh complaint.

Mr C raised other concerns after bringing his complaint to us. He said clause 1.4 of the standard terms and conditions added to the policy requirements for his claim to have prospects of success and could lead to claims being rejected. The wording about prospects of success is more detailed than in the policy, but it’s not out of line with what we’d consider to be fair.

Mr C was also unhappy with the requirement for the standard terms and conditions to be kept confidential and information to be destroyed once the agreement ended under clauses 1.10 and 3.14.

Fairmead provided an explanation in response to Mr C’s concerns. I’d encourage them to bear these points and the whole of the standard terms and conditions in mind when considering any changes.

Finally, to be clear, the changes Fairmead would need to consider would be *to the standard terms and conditions* they seek to agree with the solicitors, *not the policy* as they mentioned in their response to my provisional decision.

Hourly rates

Mr C said I hadn't considered his proposal that the solicitors' hourly rates should be agreed at £226 plus VAT. I understood Mr C was happy to compromise on the basis Fairmead would pay £216 plus VAT and he'd fund the balance. Even if that's not the case, I've explained why I think Fairmead's offer to pay £216 plus VAT is fair and I see no reason to change my mind about that.

Time for payment of the solicitors' fees

Mr C argues the policy didn't make clear that Fairmead wouldn't make interim payments or that repayment of the solicitors' costs would only be made at the end of the claim. He says it was reasonable to think, from the policy wording, they'd be paid when they fell due.

The policy makes no mention of when costs will be paid. And there's no requirement for Fairmead to make interim payments. I'm not aware Mr C's unable to pay his solicitors' fees. So, I've no reason to think he's unable to instruct them or that his choice of solicitor is restricted. And an arrangement under which costs are paid at the end of the case doesn't unfairly restrict his entitlement to legal expenses cover up to £50,000, subject to the other terms and conditions of the policy, as he's suggested.

I still think Fairmead has made a fair offer to accept interim bills for disbursements on a quarterly basis. That means the solicitors or Mr C won't need to fund them.

Distress and inconvenience

I acknowledge Mr C's strength of feeling that Fairmead have tried to pressurise him into agreeing the terms and conditions. I'm not persuaded they've been deliberately intimidating, although I can understand Mr C's felt under pressure. Fairmead failed to fully understand Mr C's concerns about the effect of the terms and conditions or their compatibility with the policy. And I think they ought to have appreciated sooner his concerns that it wasn't appropriate for them simply to impose on Mr C's solicitors terms and conditions designed to manage panel solicitors working under a CFA. I agree Fairmead's approach has delayed Mr C's legal claim from progressing. Looking at what's happened since August last year, I still think £250 is fair compensation.

Putting things right

Bearing the above in mind, I've thought more about how Fairmead should put things right.

I won't direct Fairmead to review or make changes to their standard terms and conditions. But I'd encourage them to look at all the standard terms and conditions to check they are compatible overall with the policy to avoid any further disputes and delays to Mr C's claim. And I'd also encourage them to let Mr C know, within the time Mr C has to accept this decision, if they intend to make any changes, so he knows how things stand.

To conclude Mr C's complaint, Fairmead should pay compensation of £250 within 14 days of Mr C accepting my decision if he chooses to do so.

My final decision

I direct Fairmead Insurance Limited to pay Mr C £250 compensation for distress and inconvenience, inclusive of the £150 they've already offered him, within 14 days of Mr C accepting this decision should he choose to do so.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 25 October 2022.

Julia Wilkinson
Ombudsman