

The complaint

Mr and Mrs H complain about the way Inter Partner Assistance SA (“IPA”) has handled a claim under their legal expenses insurance policy.

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

What happened

In 2012, Mr and Mrs H made a claim under their legal expenses insurance policy to pursue action for professional negligence against a third-party regarding building works carried out at their property. The claim was declined as it was considered to be caught by two policy exclusions. In addition, it wasn’t thought to enjoy reasonable prospects of being successful (a requirement for cover under the policy).

Mr and Mrs H pursued the matter privately and received a global offer from the third-party – inclusive of damages, interest, and costs – to settle the dispute. Whilst the offer was lower than what they were seeking, without the benefit of funding under their insurance policy, they couldn’t afford to take the claim any further. So they accepted the offer.

In 2016, Mr and Mrs H returned to their insurer and it was acknowledged that the two policy exclusions had been applied incorrectly. But the issue of whether there were reasonable prospects remained disputed.

In around 2017, Mr and Mrs H raised a complaint to our service. As a result of our intervention, a barrister provided an assessment as to the level of damages recoverable had the claim continued, as well as the prospects of success when the claim was first made in 2013.

In 2020, Mr and Mrs H returned to our service. They said the barrister was of the opinion a higher settlement wouldn’t have been achieved. But they had concerns that the incorrect policy document had been considered when coming to this opinion.

At this point, it was identified that the correct insurer of Mr and Mrs H’s policy was IPA, but Mr and Mrs H didn’t agree. So the matter was passed to one of my ombudsman colleagues here, who concluded that IPA were the insurers of the policy and the correct respondent for this complaint.

As neither IPA or Mr and Mrs H rejected that decision, the case was passed back to our investigator to look into the outstanding complaint points. I understand the key issues are as follows:

- The barrister has considered the case based on an incorrect policy document which Mr and Mrs H believe has impacted the outcome reached.
- Mr and Mrs H raised a complaint about the barrister to the Legal Ombudsman as they believe he has made errors in his assessment. Because of this, they don’t think IPA should rely on the advice.

- They've asked that IPA reimburse the legal costs incurred in pursuing the claim, which would otherwise have been met by the policy had it not been incorrectly declined.
- They've asked that IPA reimburse the legal costs incurred in providing instructions to the barrister and for bringing a complaint to our service.
- They believe IPA should pay more than £500 compensation.

Our investigator upheld the complaint recommending that IPA should instruct a cost draftsman to calculate what legal costs were reasonable and necessary in pursuing the claim. IPA should pay 50% of this amount, plus 8% simple interest per annum. She didn't think IPA's liability should be limited to the policy's indemnity of £50,000, as it lost the opportunity to apply the policy terms when the claim was declined in error.

Our investigator explained that 50% was to reflect the fact that Mr and Mrs H's settlement was inclusive of legal costs. And whilst IPA could've sought to recover all its costs from the award, it wouldn't have been fair to – rather, a 50% recovery would've been reasonable. The 8% interest was in recognition that Mr and Mrs H had been without this money from the date they had to pay it.

Our investigator was satisfied that IPA were entitled to rely on the barrister's assessment. She wasn't persuaded the policy documents had any impact on the outcome of the advice, given that the assessment was on the merits and potential outcome of the legal claim rather than the policy cover.

She also didn't think it was fair for IPA to meet the legal costs Mr and Mrs H had incurred in providing instructions to the barrister or raising their complaint. She thought both processes were straight forward enough for a layperson to do without legal representation. And whilst Mr and Mrs H were entitled to seek legal guidance, this didn't mean IPA were responsible for the cost of it.

And finally, our investigator was satisfied that Mr and Mrs H had already received £500 compensation. Whilst IPA may not have been the one to pay it, she didn't think Mr and Mrs H should be compensated again for the same issues.

IPA didn't respond to our investigator's view. It initially indicated that it would make an offer to settle Mr and Mrs H's legal costs, rather than getting them assessed by a cost draftsman. But this offer hasn't been forthcoming.

Mr and Mrs H didn't accept our investigator's view of the complaint. I understand the key reasons to be:

- Had the claim been accepted correctly, they would've used a panel solicitor whose costs would've been lower. As a result, they would've got more for the money spent. Because of this, they don't think the award made for their legal costs puts them back in the position they would've been in had the error not occurred.
- IPA can't rely on the barrister's advice because it was obtained for the insurer previously thought to be responsible for their policy.
- The barrister has commented on the terms of the policy within the assessment and therefore the correct policy document will alter the advice.

- They remain of the opinion that £500 doesn't adequately compensate them for what's gone wrong.
- They don't believe IPA is the correct insurer of their policy.

Our investigator considered the further points made, but it didn't alter her opinion of how the complaint should be resolved. As the parties aren't in agreement, the complaint was passed to me to decide and in August 2022 I issued the following provisional decision.

My provisional decision

Correct respondent

Another ombudsman at our service has decided that IPA are the correct respondent for this complaint. I appreciate Mr and Mrs H still have reservations about this, but I haven't seen anything to persuade me that this issue needs to be revisited.

Claims decision

It isn't disputed that the policy exclusions were incorrectly applied to Mr and Mrs H's claim initially. But from what I've seen, reasonable prospects of success hadn't been established therefore no cover was available under the policy in any event.

Mr and Mrs H subsequently obtained a further legal assessment which confirmed prospects of success existed. But by this point, the claim had been settled and the legal costs had been incurred.

I appreciate Mr and Mrs H now want IPA to cover their legal costs. But I have to be satisfied that the claim was incorrectly declined on prospects in 2013, and I can't see that a persuasive and supportive prospects assessment had been provided on the claim at that time.

I can understand why Mr and Mrs H didn't dispute prospects initially – as they thought their claim was declined for multiple reasons, rather than just their chances of winning. I think had the claim only been declined on prospects initially, Mr and Mrs H may have done more to dispute the decision before going on to pursue it privately. And the recent barrister's opinion confirms prospects did exist in 2013. So overall, I think it's fair and reasonable to consider a contribution towards the legal costs incurred in pursuing the claim.

Legal costs

Where a business has done something wrong, we'd expect them to put the customer back in the position they would've been in had everything been done correctly, as far as reasonably possible. But it's not always clear what that position would've been. And in this case, it's certainly not straight-forward.

It's clear that had Mr and Mrs H's claim been accepted, they would've benefitted from having some legal costs covered by the policy. But what that cover looks like in hindsight is difficult to determine, as there are many different variables.

For example, I can't say with any certainty whether Mr and Mrs H would've used a panel firm or remained with their chosen solicitor. And regardless of their legal representation, I don't know how much of the policy's indemnity limit would've been used by the time the offer was

made. If it was exhausted before the offer was received, cover would've ceased under the policy before Mr and Mrs H were able to secure any settlement. And they would have had to find an alternative way to continue paying legal costs.

The barrister's opinion is that the offer Mr and Mrs H received was a good one, and more than what they considered the claim to be worth. So it's likely cover would've ceased under the policy once this offer had been received in any event, as the policy wouldn't continue to fund the claim to court if a reasonable offer was on the table.

What I can say for sure is that, had the claim been accepted, the maximum amount IPA would've paid for legal costs is £50,000 – as this is the policy's limit of indemnity. Given that prospects were reasonable, and it was proportionate to do so, I'm persuaded IPA would've incurred costs up to the limit to pursue this matter. It's noteworthy that Mr and Mrs H incurred costs of almost £75,000 up to the point of the mediated settlement. It's for this reason that I'm inclined to award legal costs of £50,000 plus 8% simple interest per annum.

Whilst I can understand the logic behind our investigator's recommendations to get a cost draftsman's assessment, I think it's in the best interests of all parties to bring this matter to a final conclusion given the amount of years this has been ongoing. In addition, IPA were looking to make an offer but haven't corresponded with us since that point. It seems to me what's fair and reasonable in all the circumstances is that finality is brought to the matter, which has been ongoing for more than nine years.

I'm not inclined to award any legal costs towards the instructions to the barrister or the pursuit of this complaint. As our investigator has said, these processes are straight-forward and don't require legal representation. If Mr and Mrs H felt they needed this support, then it's for them to meet the costs of it.

Barrister's assessment

Whilst I appreciate the barrister has commented on the cover available under the legal expenses policy, I'm not persuaded that this has any bearing over his findings on the merits and quantum of the legal claim.

I'm also not persuaded that, because this assessment wasn't obtained for IPA specifically, it can't rely on it. The advice is provided on the facts and evidence of Mr and Mrs H's legal claim for the benefit of them and their insurer.

And finally, I haven't seen any report from the Legal Ombudsman which indicates that this advice was factually incorrect or obviously wrong. So I'm satisfied that, based on what I've seen, IPA can rely on this advice. And I'm not recommending that a further assessment be obtained.

Compensation

I appreciate Mr and Mrs H have had a stressful time throughout the duration of this dispute. But I'm mindful they previously received £500 compensation which they had accepted. And whilst Mr and Mrs H remained unhappy, I don't think there was anything more I could've reasonably expected IPA to do. So I'm not inclined to award any further compensation to that what has already been paid.

Responses to my provisional decision

Mr and Mrs H raised a number of points in response to my provisional decision. I don't intend to list them all in as much detail that's been provided. But an overview of the key points are as follows:

- Reasonable prospects against the architect was never stated as a reason for declining the claim, only against the contractor.
- Prospects were clearly reasonable from the outset as the evidence was "stark" – as stated by the barrister in his recent opinion.
- The policy only covers a panel solicitor's legal costs prior to the issue of court proceedings, so Mr and Mrs H would've had to have used them. And this would've been under a fixed fee arrangement, so it's unlikely the limit of indemnity would've been exhausted.
- The proposed award "won't nearly" put Mr and Mrs H back in the position they would've been in had the insurer's error not occurred.
- The policy provides for comprehensive coverage and doesn't have a limit of indemnity because "there's no risk transfer".
- Mr and Mrs H are awaiting the outcome of the Legal Ombudsman's investigation into the barrister's assessment. If they conclude that the opinion is "error strewn and factually wrong" in regard to quantum and the reasonableness of the settlement offer, IPA would no longer be entitled to rely on it. In that case, Mr and Mrs H would like the opportunity to raise a new complaint.
- Mr and Mrs H remain of the opinion that £500 compensation is inadequate. They accepted this amount for the original poor handling of their claim, but since that time IPA has prolonged the dispute unnecessarily and provided false information to our service, obstructing our investigation – which has caused them severe distress.

IPA acknowledged receipt of my provisional decision but provided no further comments.

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.

Again, I would like to reassure Mr and Mrs H that whilst I'm aware I may have condensed some of the complaint points in far less detail and in my own words, I've read and considered everything they've told us.

I'm satisfied I've captured the essence of the complaint and I don't need to comment on every point individually, or possibly in the level of detail they would like, in order to reach what I think is a fair outcome. This isn't meant as a discourtesy, but it simply reflects the informal nature of our service.

Legal costs

Having considered the further comments provided, I remain of the opinion that a fair outcome to this complaint which brings finality to both sides is for IPA to pay legal costs of £50,000 plus 8% simple interest per annum. I'll explain why.

- As I've stated previously, I can't say with certainty how the claim would've progressed had it not been declined incorrectly as there are many different variables. Whilst I acknowledge Mr and Mrs H's point that the policy only covers the costs of a panel firm prior to the issue of court proceedings, that by no means confirms that they would've used one. Many customers who have already engaged with their own solicitor choose to stay with them and pay costs privately up to the point of issuing court proceedings. And even if a panel solicitor was used, they may have considered the claim too complex to be dealt with under the usual panel firm pay structure.
- Mr and Mrs H accepted a settlement offer than was inclusive of legal fees, so they would've always had to have put some of this towards IPA's costs had the claim been funded by the policy. So whilst I am only awarding £50,000 against the £75,000 they incurred, this takes into account that some of their settlement would've always have gone towards legal costs.
- The award of interest is in recognition that Mr and Mrs H have been without this money from the date they had to pay it.
- It's not clear what Mr and Mrs H mean when they say the policy has no limit of indemnity as there's no transfer of risk. The policy is clear that it will pay up to the limit of indemnity which is £50,000.

Barrister's assessment

I'm mindful that Mr and Mrs H wish to rely on the barrister's assessment where he states that the claim enjoyed reasonable prospects of success back in 2013. But they dispute his opinion in regard to quantum and the likely settlement of the claim, saying there are errors and factual inaccuracies.

As it stands, we don't have the outcome of the Legal Ombudsman's investigations and I can only make my final decision based on the evidence available. I can't take into account what might happen or hypothetical situations. But Mr and Mrs H should be aware that if the Legal Ombudsman is of the opinion that the assessment is flawed for whatever reason and should not be relied upon, this is likely to relate to the assessment as a whole and not just the parts they object to.

As with any complaint that comes to our service, if new material evidence comes to light that may alter my final decision, then the complaint may need to be revisited at that time.

Compensation

Whilst I acknowledge that no amount of money can undo what's gone wrong here, I remain satisfied that £500 adequately compensates Mr and Mrs H for the distress and inconvenience they've experienced as a result of their claim being incorrectly declined.

I'm aware that Mr and Mrs H are unhappy with IPA's conduct since then, and that they believe the matter has been unnecessarily prolonged. But I'm satisfied this is addressed in my award of 8% simple interest per annum on their legal costs, which recognises the amount of time they've been without this money.

And finally, I've seen no evidence of IPA trying to obstruct our investigation or knowingly providing us with false information.

My final decision

For the reasons I've explained, I'm upholding this complaint and directing Inter Partner Assistance SA to pay Mr and Mrs H the sum of £50,000 plus 8% simple interest per annum* from when Mr and Mrs H paid their legal fees (evidence of payment to be sent to IPA) to the date settlement is sent.

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

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

Sheryl Sibley
Ombudsman