

The complaint

Mr F complains about the way Fairmead Insurance Limited has handled a claim under his legal expenses insurance policy.

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

What happened

The detailed background to this complaint is well known to both parties, so I only intend to provide a summary of the key events here.

In early 2019, Mr F submitted a claim to Fairmead under his legal expenses policy to pursue a firm of solicitors for professional negligence. Fairmead agreed that Mr F could use a solicitor of his own choice. It entered into communication with the chosen firm to determine whether the claim met the policy requirements and to agree terms of appointment.

Fairmead and the chosen solicitors were unable to agree to an hourly rate. DAS said the policy terms only provide £100 per hour. But the solicitor's hourly rate was £409. Mr F raised a complaint, and in DAS' final response letter dated 4 July 2019, it offered to pay the county court rate for Mr F's post code, which was £267 for a grade A fee earner.

This complaint was brought to our service and our investigator was satisfied Fairmead's offer was fair and reasonable in the circumstances. He emailed Mr F setting out the reasons for his outcome but didn't receive a response, so the complaint was closed in November 2019.

I understand that in May 2019, the solicitor informed Fairmead that they wished to suspend the claim for indemnity under the policy whilst steps to mitigate Mr F's losses were explored.

In May 2021, the solicitor returned to Fairmead to ask for cover under the policy. Due to the amount of time that had passed, Fairmead required an updated assessment of the claim to ensure it still met the policy requirements, in particular that it enjoyed reasonable prospects of success. But the solicitor was unable to confirm this without undertaking a considerable amount of work.

They asked Fairmead to pay their new hourly rate of £400 for the work on assessing prospects to be completed. But Fairmead reiterated its offer of £267. In addition, it said it was unable to pay any costs until prospects were confirmed as reasonable, as until that time it was unable to accept the claim under the policy.

Whilst the solicitor subsequently agreed to the hourly rate of £267, they asked Fairmead to cover the cost of obtaining a prospects assessment from counsel – which Fairmead declined to do.

On November 2021, as cover was still not in place, Mr F agreed to use a panel solicitor. Fairmead sent instructions to one of its panel firms and in January 2022, the panel solicitor provided a legal assessment concluding that the claim didn't enjoy reasonable prospects of success.

Mr F raised a complaint for the following reasons:

- Fairmead had provided poor service, including delays in responding to correspondence and failing to return calls.
- The panel legal assessment was conducted by a paralegal and not a suitably qualified solicitor. He didn't agree with the legal opinion, and he didn't think Fairmead should rely upon it when deciding on cover for his claim.
- The panel solicitors instructed had dealt with his initial claim, prior to the solicitors that he wants to pursue for negligence. As such, he's concerned there's a conflict of interest.

Fairmead didn't uphold the complaint about the legal assessment. But it did acknowledge that there had been delays which it was responsible for. It offered £200 compensation, which was paid in April 2022.

As Mr F wasn't happy with this response, he brought his complaint to our service. Our investigator was satisfied that Fairmead was entitled to rely on the legal assessment of its panel firm as it wasn't obviously wrong. He was also satisfied that no conflict of interest had been identified and declared to Fairmead that it needed to act on.

But our investigator was of the opinion that the offer of compensation was too low based on the delays Mr F had experienced. He recommended that Fairmead pay an additional £150, which Fairmead accepted.

Mr F didn't accept our investigator's findings, and raised the following points:

- Fairmead failed to offer a fair hourly rate based on the complexity of his case and the seniority of fee earner required.
- Fairmead unfairly refused to pay for his chosen solicitor to complete the prospects assessment.
- Fairmead should've obtained counsel's advice after receipt of the panel solicitor's negative assessment, which Mr F believes is Fairmead's responsibility on the basis that it already had a supportive legal assessment from his chosen solicitor in 2019.
- Despite his many requests, Fairmead refused to arbitrate under the policy and instead referred Mr F to our service.

As the complaint is unresolved, it's been passed to me to decide.

I understand that since this time, Mr F's chosen solicitor has now provided a supportive legal assessment on the prospects of success of the claim. Fairmead has agreed to fund counsel's advice as a third and final opinion to determine cover, and there is a dispute over the hourly rate for Mr F's chosen solicitor to provide instructions. To be clear, I can't look into these issues.

My decision is dealing only with the complaint points raised between 4 July 2019 and 20 January 2022. I can't make a determination of anything that has already been decided prior to this date, or anything that has arisen since.

I'm aware that Mr F has raised a complaint to Fairmead regarding the issues that have arisen since that time. And once he has its final response letter, or if eight weeks passes without one, he can return to our service, and we will set up a new complaint to consider what's happened during that time period.

My provisional decision

I'd like to reassure Mr F 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 he's 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 he 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.

Prospects assessment

The policy's terms and conditions say that claims must have reasonable prospects of success which are defined as being "*more likely than not*" that the claim will be successful. In percentage terms, this would be 51% or above.

This is a requirement of virtually all legal expenses policies, and we don't think it's unfair. Court action can be expensive. A privately paying customer wouldn't generally want to bear the cost if advised it's unlikely to succeed. And we wouldn't expect a legal expenses insurer to either.

Where an insurer has declined or withdrawn funding in such a case, it isn't for us to evaluate the merits of the underlying claim. Instead, we look at whether the insurer has acted fairly. As long as they've obtained advice from suitably qualified lawyers, we won't generally question their reliance on that advice, unless we think it was obviously wrong or based on factual mistakes.

In this case, Fairmead obtained a legal assessment from one of its panel firms of solicitors who said the claim didn't enjoy reasonable prospects of success. Whilst I appreciate Mr F disagrees with the advice, I'm satisfied it is well-reasoned and not obviously wrong. And it was based on all the information available at that time.

Mr F is concerned that it's been obtained from a paralegal, but the firm have confirmed that they were supervised by a senior colleague – the details of which have been set out in our investigator's view of the complaint. So I'm satisfied it's been obtained from a suitably qualified lawyer.

Mr F is also concerned that the panel firm are conflicted. As our investigator has explained, the solicitors have an obligatory duty to the Solicitors Conduct Authority (SCA) to check for possible conflicts of interest. I haven't seen anything to suggest a conflict was identified and, other than seeking confirmation of this from the solicitors, it wouldn't be for Fairmead or this Service to investigate whether these checks were done in accordance with the SCA's code of conduct requirements. If Mr F is concerned these checks weren't completed correctly, he should raise this with the solicitors directly and follow their complaints process.

For these reasons, I haven't seen anything to persuade me that Fairmead couldn't rely on the legal assessment provided by its panel firm. Rather, it was up to Mr F to obtain a contrary legal opinion on the merits of his claim, at his own cost, if he wanted to challenge this further.

I understand Mr F feels it was Fairmead's responsibility to obtain the further opinion, as he says it was already in receipt of a supportive assessment from his chosen solicitor in 2019. But I don't agree. Two years had passed since this assessment was provided and Fairmead were advised that steps were being taken to mitigate Mr F's losses during that time, which indicates that the position would've changed and the assessment was out of date. As prospects can change throughout the life of a claim and is an ongoing consideration for cover, I'm not persuaded the 2019 assessment was relevant when considering cover in 2021.

Mr F is also unhappy that Fairmead refused to pay the cost of his chosen solicitor's work to complete the legal assessment on prospects, rather than instructing a panel firm. But I'm not persuaded this is something the policy covers. The policy is clear that it will cover the legal costs to pursue a claim if it enjoys reasonable prospects of success; it doesn't cover the cost of investigating whether the claim enjoys reasonable prospects of success. It's Mr F's responsibility to show he has a valid claim under the policy terms.

As I've explained above, Mr F has now provided a supportive legal assessment of his claim, but as it was after Fairmead's final response of 20 January 2022 this can't be considered as part of this complaint.

Hourly rate

Mr F has made several comments about Fairmead failing to offer a fair hourly rate. But as I've explained above, our service considered this complaint in 2019 and we determined that the offer of £267 was fair. As such, I'm unable to consider this matter and will not comment on it further.

I understand there is a further dispute over the hourly rate offered for the chosen solicitor's work in providing instructions to counsel. As this has occurred after Fairmead's final response of 20 January 2022, this can't be considered as part of this complaint.

Delays

Looking at the timeline of how this complaint has been handled, it's clear there has been instances where Fairmead's service has been below what I'd consider to be reasonable. Fairmead itself acknowledge that it caused some delays in November 2021 and paid £200 compensation for what went wrong. But, as our investigator has explained, there were further instances in May and July 2021 when Fairmead didn't respond to correspondence as promptly as it should have.

Our investigator recommended a further £150 compensation, which Fairmead agreed to. I'm satisfied this amount fairly reflects what went wrong here and the impact it had on Mr F. I appreciate the limitation period for Mr F's claim is imminent, but I'm not persuaded that these relatively minor delays by Fairmead have caused any prejudice. I must bear in mind that Mr F had six years to bring this claim, and he and his solicitors weren't in touch with Fairmead for two years of the limitation period.

Arbitration

The terms and conditions of the policy say:

"Prospects of success

We will pay costs as long as the administrator considers that your claim has prospects of success. If at any stage the administrator considers that your claim does not have prospects of success, the administrator will explain their decision to you in

writing, and the administrator will not provide any cover for your claim. If you disagree with the administrator's decision, you can refer the matter to an arbitrator (section 4, general condition 11)."

Section 4, general condition 11 says:

"Disputes

In event of dispute arising out of this policy, you may refer the matter to arbitration. Further details can be provided upon request."

The policy defines "administrator" as "the service provider selected by us from time to time to administer the claims under this section of the policy". This means the claims handlers, who act on Fairmead's behalf.

I can see from the information provided that Mr F asked to go to arbitration, but Fairmead advised against it. It said arbitration is expensive and the losing party will be liable for the costs, so it told Mr F to come to our service instead. Mr F was adamant that he wanted to go to arbitration but at this point Fairmead refused. It said the role of the arbitrator is to rule on the application of the policy terms rather than assess the merits of the case, so it insisted that Mr F come to our service in the first instance.

Whilst I don't disagree with what Fairmead has said here, the policy does say details about the arbitration process can be provided upon request and Mr F requested the details. So I think it should've provided this information, even if it wasn't prepared to go to arbitration at that time.

But I don't think Mr F has been prejudiced by this. I say this because although Mr F has the right to request arbitration, the aim is to resolve their dispute and – given that he's come to us, and we've been able to decide the issue – he hasn't really suffered any loss (especially as our service is free and arbitration isn't).

Responses to my provisional decision

Whilst Mr F has responded to my provisional decision, his comments are limited to his new complaint points which arose after 20 January 2022. He believes the eight weeks has passed since he notified Fairmead of his expression of dissatisfaction, so I'll leave this with our investigator to look into and set up a new case if necessary.

Fairmead didn't respond.

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

For the reasons I've explained, I uphold this complaint and direct Fairmead Insurance Limited to pay an additional £150 compensation for the impact suffered by Mr F as a result of its delays and poor service.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or

reject my decision before 23 February 2023.

Sheryl Sibley
Ombudsman