

The complaint

Mr S complains that RiverStone Insurance (UK) Limited has declined to cover costs being claimed by the opposing party following the conclusion of legal proceedings under his legal expenses insurance policy.

Mr S' policy was originally underwritten by another insurer, but RiverStone took over these liabilities. Solicitors and claims handlers have also acted on RiverStone and the previous insurer's behalf during the course of Mr S' claim. Where I refer to RiverStone in my decision, this should be taken to include the previous insurer where appropriate and those handling and reviewing the claim.

What happened

Mr S held an after the event legal expenses insurance policy with RiverStone. He was making a claim for personal injury. The details of that claim aren't relevant to my decision.

Mr S' legal claim was unsuccessful, and the other party (M) sought to recover its costs from Mr S. Those costs would be covered by the policy.

As no offer had been received from Mr S, K or RiverStone, M obtained a Default Costs Certificate (DCC) in September 2016. This stated Mr S was liable for M's costs totalling £83,852.94.

After reviewing the information available, RiverStone agreed to cover M's costs up to 2 January 2014 as it said Mr S, and his solicitors (K) had received information then that the claim didn't have reasonable prospects of success.

RiverStone appointed a cost agent to seek to negotiate M's costs. In 2020, the cost agent said M had declined to negotiate and so payments totalling £73,326.21 had been made by RiverStone to cover the costs M had incurred up to 2 January 2014.

Mr M subsequently received correspondence from M demanding the payment of the remainder of the costs, as well as interest totalling £16,097.14, which had been accrued since the Default Costs Certificate was issued in 2016.

K, on behalf of Mr S, complained to RiverStone. They said that RiverStone should have raised Points of Dispute (POD) before the DCC was issued to challenge the costs claimed by M. They also said that RiverStone should be liable for the interest accrued as this had built up during the time when RiverStone's appointed cost agent had been dealing with the matter.

When RiverStone rejected the complaint, Mr S approached our service. Our investigator didn't think RiverStone had done anything wrong. Mr S didn't agree and asked for an ombudsman's decision.

I reviewed the complaint and considered that Mr S' complaint should be upheld in part. I issued a provisional decision, the details of which are below. RiverStone has responded to that provisional decision. No response has been received from Mr S or his representatives.

My provisional decision

In my provisional decision, I said:

Mr S' complaint isn't about whether RiverStone acted reasonably when it declined to cover any costs after 2 January 2014. It seems to be accepted that K had received an assessment that Mr S didn't enjoy reasonable prospects of success and in line with the policy terms and conditions, RiverStone wouldn't have continued funding Mr S' proceedings if it had been aware of this. That's a fair position.

The complaint Mr S refers to us is that before the DCC was issued, RiverStone didn't dispute the costs being claimed. In the absence of any challenge to the costs, the DCC was issued for the full amount claimed by M. RiverStone says it was unable to dispute the costs claimed as the requested information from K wasn't received in time for it to meaningfully challenge M's claim.

It doesn't seem to be disputed that RiverStone was regularly asking K for information relating to Mr S' claim, and that all of the required information wasn't received until after the DCC had been issued. I can't see that any action, or failure to act, on the part of RiverStone was the reason for the DCC being issued. I think it's fair to say RiverStone couldn't assess its position regarding liability for the claim until it had all the required information, which it didn't receive before the DCC was issued.

I also agree it's unreasonable to expect RiverStone to have challenged M's costs before the DCC was issued in the absence of all of the information it needed to make an assessment regarding the extent of its liability.

In December 2016, RiverStone appointed the cost agent, informing K of this. The correspondence from the cost agent in 2020 indicates that M had originally indicated it was prepared to negotiate the costs but had since declined to engage further. Payment of the costs to 2 January 2014 was made. After this, M wrote to Mr S about the remaining amount, and also said that interest amounting to £16,097.14 had been accrued since 2016, was unpaid, and was continuing to accrue.

I don't think it's reasonable for RiverStone to refuse to have any further involvement regarding the interest being sought. The interest has accrued since 2016. RiverStone has been aware throughout of the costs and amounts outstanding. The DCC, which it was in receipt of, said that in the event that the amounts stated weren't paid then interest could be added.

Riverstone appointed the cost agent to seek to negotiate the costs, when it knew the DCC had been issued and so it's reasonable to say it was aware that interest could be added to the amounts due. The cost agent wasn't able to negotiate a settlement. M now seeks interest for the period when the costs were unpaid.

I'm unaware of any further court order or other documentation requiring that interest be added to the amounts stated in the DCC. The DCC itself says interest may be added. I'm not in a position to comment on whether the interest is being sought fairly or not, nor whether the amounts being sought and rates referred to by M are reasonable.

I think RiverStone should be acting to resolve the interest on the amounts it covered under the policy. It seems to me it had a choice as to whether to settle the costs in 2016, or seek to involve the cost agent. It chose to appoint the cost agent and so any additional amounts which become reasonably, or legally, due on its liability because it did so should be met by RiverStone. There was a risk in seeking to negotiate the costs that interest could accumulate. It seems unfair to me for that risk to be passed to Mr S in its entirety.

Mr S (via his solicitors K) was aware that the cost agent had been appointed. It's also reasonable to say that he (or at least K as his representatives) were aware of the DCC and its statement that interest could be charged on the amounts stated.

I'm satisfied Mr S would have had some possible benefit from the involvement of the cost agent in that the proportion of the costs that he was liable for would be subject to the same assessment and attempts to negotiate. Mr S has been charged for some of the cost agent's fees. In light of this, I'm satisfied the cost agent was acting for both Mr S and RiverStone. I

think it's fair to say he should bear some of the risk involved in appointing the cost agent – so I'm satisfied that interest reasonably accrued on the portion of the costs he's liable for isn't something RiverStone needs to cover.

To put things right here, RiverStone will need to assume liability for the interest amounts accrued on the £73,326.21 – that being the total of M's costs that it has covered. That doesn't, in my view, require it to pay those costs now (although it may choose to do so). If RiverStone disputes the application of interest, the dates it's been charged from and to or the rate applied, I think it's fair to say it may do so.

At the end of any related proceedings or discussions with M about this point, it may be established that an amount of interest is due. If that's the case, then RiverStone will need to pay that amount – even if this means the policy indemnity limit is exceeded. This is because, as I've outlined above, the decision to proceed with the negotiation of the costs, which seems to be the primary driver of the interest accruing, was made by RiverStone. It wouldn't be reasonable for RiverStone to say that the indemnity limit had been exhausted and pass some of the costs it would otherwise be liable for to Mr S.

Mr S also received a letter from M detailing that a very significant amount of interest was due. While I acknowledge that, in line with my findings, he would have been liable for some amount of interest, the figure would have been much lower. I think that receiving a letter with such a large figure would have caused him distress. To recognise this, I think RiverStone should pay £250 compensation to Mr S.

The responses to my provisional decision

Mr S hasn't responded to my provisional decision. RiverSkill's response outlined why they disagreed with my conclusions.

RiverSkill's response can be briefly summarised by the following points:

- Mr S had delayed sending it the file, and that was why the DCC was issued.
- If the file had been provided in good time, it would have sought to appoint a cost agent before the DCC was issued.
- It paid £48,000 on account while the cost agent was in contact with M in order to minimise interest.
- It had paid the cost agent's invoice, even though it had been sent to Mr S for payment.

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.

I've carefully considered all the points raised by RiverStone in response to my provisional decision. I've also reviewed my provisional findings. I remain satisfied that the complaint should be upheld in part, for the reasons I previously gave. I don't intend to repeat my findings in detail, but will address the points raised by RiverStone briefly.

I note RiverStone's points about the delays to the file being provided, and the impact this had. I've addressed why I don't think RiverStone is responsible for the DCC being issued, and don't consider any delays or inactions on their part contributed to that. I haven't upheld Mr S' complaint on that point. What I have said is that, once the DCC had been issued, it was RiverStone's decision to appoint the cost agent and so any additional costs which become reasonably due on its liability should be covered by RiverStone. I've outlined my reasons for this.

I can also see that RiverStone hasn't sought to limit its liability because of the alleged delays in providing the file by Mr S. It hasn't said the cost agent would have been able to get a reduction in M's costs if the DCC hadn't been issued. The only limit it placed on its liability was to say that it wouldn't cover costs incurred beyond January 2014, a point which wasn't disputed by Mr S.

I think it's fair to say that if RiverStone is now seeking to say that the delay in providing the file prejudiced its position in that without the delay it would have paid less costs, then that should have been its position from the outset. It hasn't done so. It's paid all the costs sought by M up to the date it would have cut off cover.

I acknowledge RiverStone made a payment of £48,000 on account while the cost agent was in contact with M. That it was to seek to limit interest charges is noted, but I think this again highlights that RiverStone was aware, or should have been aware, that interest was likely to accrue because of its decision to appoint the cost agent. If that's the case, then it follows that it's fair for liability for those additionally accrued amounts to fall on RiverStone.

The £48,000 payment will, I assume, impact the interest amounts, but the calculations which have led to the claim by M are unknown to me and would presumably be the subject of challenge and discussion moving forward between the parties. I've said that RiverStone should only be liable for interest on the amounts it's paid. The £48,000 payment will be taken into consideration as part of the relevant calculations in due course.

Finally, I'm aware the invoice for the cost agent was passed initially to Mr S. RiverStone paid this. I'm unsure of the relevance of this to my decision about liability for the interest being claimed by M. The invoice wasn't the subject of any complaint made by Mr S about RiverStone.

My final decision

It's my final decision to uphold this complaint in part. In order to put things right, RiverStone Insurance (UK) Limited must:

- Assume liability for interest accrued on the costs paid to M totalling £73,326.21.
- Pay £250 compensation to Mr S. Riverstone must pay this amount within 28 days of us telling it Mr S accepts our decision. If it doesn't, then it must pay simple interest at a rate of 8% from that date to the date of final settlement..

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 24 April 2023.

Ben Williams
Ombudsman