

The complaint

Mr J complains Royal & Sun Alliance Insurance Limited (RSA) unfairly declined his claim for cover under his legal expenses insurance (LEI) policy to pursue negligence claims against his union and lawyers in relation to an employment dispute.

Where I refer to RSA, this includes their agents and claims handlers acting on their behalf.

What happened

Mr J was involved in a dispute with his employers and their training partners (the employer). In around 2017 he approached his union for help, and they appointed solicitors to act for him in bringing a legal claim against the employer. A barrister represented Mr J at the final hearing in January 2021. When judgment was issued a few months later, he found out his claim had failed on all issues.

Mr J was unhappy with the service and legal advice he'd received from the union and lawyers (the advisers). He said, in summary, the union provided a sub-standard firm of solicitors, the solicitors didn't appoint a suitable lawyer to work on his case, the solicitors failed to set out the claims properly and the barrister made several mistakes, most notably in failing to make an oral closing argument at the final hearing.

In July 2021 Mr J made a claim on his LEI policy with RSA to cover his costs of taking legal action against the advisers. RSA initially declined the claim in full. They understood the final hearing in Mr J's employment case had taken place in January 2020. And they said his claim fell within a policy exclusion since the event giving rise to the claim had happened before the policy started.

Mr J clarified that the final hearing had happened in January 2021. RSA said the claims against the union and solicitors still fell within the exclusion. And although they accepted the barrister had only been involved in relation to the January 2021 final hearing, the claim was excluded since it had arisen less than 90 days after the insurance first started.

RSA said they'd consider the claim against the barrister if Mr J could provide evidence of a pre-existing policy in place immediately before the RSA policy began. But even if he could, he'd need to go through any complaints process first. And they had concerns about the prospects of the claim succeeding and whether it was proportionate to pursue.

Mr J was unhappy with RSA's responses and complained. When they didn't uphold his complaint he brought it to the Financial Ombudsman Service. Our investigator felt RSA had considered Mr J's claim and applied the exclusions they'd relied on fairly and reasonably. Since Mr J didn't agree, his complaint's been passed to me to review afresh.

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'm sorry to hear of Mr J's employment difficulties and the concerns he's had about legal advice he was given in relation to that. I can understand he's had a stressful time. I've considered his complaint about RSA's decision on policy cover carefully. I've come to a partly different outcome than our investigator, as I'll explain. I'm issuing a provisional decision to give the parties the chance to provide further information and comments before I come to a final decision.

I'm aware that in around September 2021 Mr J made a claim on the policy he and his wife had had with other LEI insurers between 22 November 2017 and 21 November 2018. (I'll call them Insurer 1). Insurer 1 declined the claim on the basis the policy was a "claims made" policy and Mr J had made his claim outside the policy period. And they suggested he approach RSA as his current LEI was with them. I can understand Mr J was unhappy neither insurer accepted his claim.

We sometimes think it's fair for one or other of a customer's insurers to meet a claim where the customer can show they've had continuous cover over the relevant period - subject to the relevant policy terms and conditions. I've seen evidence Mr J had LEI cover immediately before he and his wife took out cover with Insurer 1. He's said he had cover between 2018 and 2020 but hasn't provided full details of that insurance. And the cover Mr J took out with RSA didn't start until the second week of December 2020. Since the policy with Insurer 1 ran from November to November, that suggests there's been a break in cover. So, in the circumstances of this case, I think it's fair to consider the RSA policy in isolation.

We expect insurers to consider claims fairly and promptly and not to decline claims unreasonably. Mr J made his claim on the RSA policy in July 2021. RSA considered it, taking into account information they asked for from Mr J's broker and Mr J himself. They listened to what Mr J said in early October after they and Insurer 1 had declined his claims in September. They looked at further information he provided and came to a decision later that month. I think RSA came to a decision on policy cover within a reasonable period of time. So, I'll go on to consider if it was fair and reasonable for them to decline the claim. The starting point is the terms and conditions of the policy.

RSA rightly considered Mr J's claim under the '**Consumer Disputes**' section of the LEI policy which said:

'What is Covered?

Costs to pursue or defend a **civil legal action** arising out of a contract **you** have entered into for:

- a) Obtaining services...

What is excluded? ...

3. Any dispute that arises less than 90 days after the insurance first started, unless the dispute is to do with a contract that started after **you** took out the insurance or **you** had an equivalent cover immediately prior to the inception of this policy without a break in cover'.

The general policy exclusions included:

- '1. **Costs** incurred:

- a. In respect of any **event** where the **time of occurrence** commenced prior to the commencement of this insurance.
- b. Where **you** are aware of a circumstance that may give rise to a claim when purchasing this insurance

...

2. Any claim if [RSA] consider it is unlikely a favourable settlement will be obtained, or where the likely settlement is disproportionate compared with the time and **costs** incurred.

...

5. Any **costs** that could have been recovered under any other insurance or from a Trade Union, public body or employer.'

'Time of occurrence' meant 'the date upon which the **event** first occurred.'

'Event' meant 'The incident or the first of a series of incidents which may lead to a claim under this insurance. Only one insured incident shall be deemed to have arisen from all causes of action, incidents or **events** that are related by cause or time.'

Mr J says he didn't know until June 2021 that he had claims against the advisers. But the policy excluded cover for any event which happened before the policy began whether he was aware of it or not. It is clear about that.

From what I've seen, Mr J first issued claims against the employer in early December 2017 and the latest claim was issued in early January 2020. Mr J was unhappy with the appointment of the solicitors by the union from the beginning. He'd complained about the level of service the union and the solicitors had provided by July/August 2018. In April 2020 following a court hearing, Mr J raised concerns about who had had access to his medical information and about the handling and outcome of the hearing.

In July 2021 Mr J told his union he was surprised by the outcome of the final hearing. He said he'd thought previously the work being carried out was of a poor standard. The outcome had confirmed his view since he felt his claims were clear cut. Mr J alleged documents in the court bundle had been badly prepared; the barrister failed to prepare his closing oral remarks properly; and he'd lost his case as a result.

When Mr J was looking for solicitors to act in a claim against the advisers he mentioned there'd been numerous mistakes by the solicitors and barrister including mistakes by the solicitors in drafting his claim. And the panel solicitors responded to several points when they addressed Mr J's complaint, including that he'd had several lawyers handling his claim, one of them had been unprofessional and many mistakes had been made in setting out his claims.

I think it's clear the final hearing and preparations leading up to it were part of a series of events involving the union and panel solicitors that Mr J was unhappy with, and which had started before the policy began. So, his claim fell within the exclusion I've set out above. Similar exclusions are often found in LEI policies, and we don't generally consider them to be unfair. I don't think RSA were unreasonable to rely on the exclusion in the circumstances of this case.

RSA accepted the barrister's only involvement was in relation to the final hearing in January 2021. They said Mr J's claim against him was excluded since the dispute arose within the first 90 days of the policy. But they'd consider the claim if Mr J could show he'd had equivalent cover immediately prior to the policy starting. I've mentioned Mr J hasn't shown that.

But I think RSA have overlooked that cover is not excluded if ‘the dispute is to do with a contract which started after [Mr J] took out the insurance.’

If, as appears, the barrister wasn’t engaged until January 2021, the 90-day exclusion doesn’t apply. Whilst RSA could ask Mr J for more information about when the barrister became involved, on the face of it the policy provides cover for the costs of pursuing a claim against the barrister, subject to the remaining terms and conditions of the policy.

RSA say Mr J has to exhaust any complaints procedure against the barrister before the policy will respond. They rely on the following policy wording:

‘Policy Conditions

...

Due Care

You must take due care to prevent incidents that may give rise to a claim and to minimise the amount payable by us’;

and

‘Claims decision

...

After receiving your claim or during the course of it we may find:

...

2. There is a more suitable course of action.

...

In these circumstances, we may not continue to support your claim and will tell you why in writing.’

The incident giving rise to the claim here is the alleged negligence on the part of the barrister in dealing with Mr J’s legal case against the employer. I’m not aware of any action Mr J could have taken to prevent that. A complaint after the incident wouldn’t have prevented it from happening.

It’s possible a complaint against the barrister could lead to Mr J recovering his alleged losses or some sort of compensation. But any outcome is uncertain. And I don’t think it would be fair for RSA to require Mr J to complain to the barrister before they consider his claim under the policy further. RSA have wrongly applied the exclusion to decline his claim and caused delay. A complaint against the barrister would prolong things. So, even if the wording RSA rely on means they can require Mr J to exhaust any complaints process against the barrister first, I don’t think it would be fair and reasonable for them to do so in the circumstances.

There are conditions in the policy that Mr J’s claim should have reasonable prospects of success and that the time and costs involved are proportionate for cover to be provided. RSA have noted their concerns about whether those conditions are met. But I’m not aware they’ve reached a decision. They’ve said they would ordinarily get solicitors’ advice. And we’d think it was fair for them to do so before coming to a decision.

Based on what I’ve seen so far, I think RSA should consider Mr J’s claim under the policy for cover to pursue a claim against the barrister only. Any claim will be subject to any further information RSA reasonably require Mr J to provide about when the barrister was instructed and the remaining terms and conditions of the policy.”

Developments

Mr J agreed with my provisional decision subject to RSA providing no further evidence.

RSA raised a new issue. They acknowledged the 90-day exclusion to the Consumer Disputes section of the policy wouldn't apply where a contract was entered into during that period. But they said the contract had to be one which Mr J had agreed to. From the available information it seemed Mr J had approached his union, they had appointed solicitors and the solicitors had appointed the barrister. They said the policy wouldn't apply if Mr J couldn't show there was a direct contractual relationship between him and the barrister.

RSA acknowledged they hadn't discussed this issue with Mr J. They proposed agreeing to my provisional decision on the basis they reassess the claim against the barrister. That reassessment would, as I understand it, include not only when the barrister was appointed, but also whether Mr J had a direct contractual relationship with him.

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.

Although Mr J's acceptance of my provisional decision was on the basis RSA didn't provide any further evidence, I haven't changed my mind about the outcome of his complaint, so there's no reason not to issue a final decision.

I've thought carefully about the new point RSA have raised.

I don't think the Consumer Disputes section of the policy requires Mr J to have a direct contractual relationship with the barrister for cover to apply. It refers only to "*civil legal action arising out of* [my emphasis] *a contract you have entered into...*". I think it would reasonably extend to a contract entered into with a third party by another person on Mr J's behalf in the circumstances that arose here.

I'm mindful there could be some nuanced legal arguments about the nature of Mr J's relationships with the advisers and whether Mr J had a contractual relationship with the barrister since the solicitors appointed him. But even if he didn't have a contract with the barrister, I don't think that matters.

The solicitors were advising Mr J and taking his instructions. So, it's reasonable to think he had a contract with them and that his dispute arises out of that contract, even if his complaint is about the barrister's work. Since the exclusion doesn't apply where there's a dispute that is "*to do with a* [my emphasis] *contract which started after* [Mr J] *took out the insurance...*". cover extends, arguably, to contracts Mr J wasn't party to, provided

- the dispute can be traced back to a contract he did enter into as it can be here and there's a direct relationship between them; and
- the contract was entered into after the policy began.

Given there's room for argument about the policy wording, it would be fair, in the circumstances of Mr J's complaint, to read the policy in his favour. I think it's fair to say the Consumer Disputes section provides cover in principle and RSA should cover the claim if the contract with the barrister was entered into after the policy began.

Bearing the above in mind, I see no reason to change my provisional decision to uphold Mr J's complaint in part for the reasons I've already set out.

Putting things right

RSA should consider Mr J's claim under the policy for cover to pursue a claim against his barrister subject to any further information they reasonably require Mr J to provide about when the barrister was instructed and the remaining terms and conditions of the policy.

My final decision

I uphold Mr J's complaint in part and direct Royal and Sun Alliance Limited to consider Mr J's claim under the policy for LEI cover to pursue a claim against his barrister subject to any further information Royal and Sun Alliance Limited reasonably require Mr J to provide about when the barrister was instructed and subject to the remaining terms and conditions of the policy.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 27 April 2023.

Julia Wilkinson

Ombudsman