

## **The complaint**

Mr and Mrs T complain that HDI Global Speciality SE (HDI) has handled a claim under their legal expenses insurance (LEI) policy unfairly. They say HDI should cover the costs they've incurred when paying for their own legal representatives.

Any reference to HDI includes the actions of its agents. For ease, I've referred to Mrs T throughout my decision as she has been leading on the complaint.

## **What happened**

The circumstances of this complaint are well known to both parties, so I've summarised what's happened.

- Mrs T has a LEI policy which is underwritten by HDI.
- On 25 March 2022, Mrs T sought to make a claim under the policy regarding a dispute about her neighbour allegedly trespassing on her land.
- The next day, Mrs T issued her neighbour with a cease-and-desist letter.
- At the end of March, HDI requested further information to assess the claim – which Mrs T provided the same day.
- On 11 April, HDI accepted the claim subject to the legal claim having prospects of success.
- Around this time, Mrs T told HDI that due to the nature of the claim a specialist legal team would be required to deal with it.
- Mrs T asked HDI for updates on her claim. And on 19 April HDI said it had appointed a panel firm of solicitors. But, the following day, HDI told Mrs T the solicitors couldn't take on the case due to the time sensitive nature of it.
- The next day HDI appointed another panel firm of solicitors (who I'll refer to as "S").
- Mrs T says she received a letter from her neighbour's solicitor on 27 April - at which point she says she had to instruct her own barrister.
- A week later, Mrs T's barrister wrote to the neighbour telling them to desist any further trespass. The barrister advised Mrs T an injunction wasn't necessary as the boundary protocol had been invoked which is designed to resolve boundary disputes quickly and with limited costs.
- Unhappy with how the claim was being handled, Mrs T complained to HDI. In its final response dated June 2022, HDI said Mrs T's freedom to choose her own solicitor only applied when legal proceedings were imminent or if there was a conflict of interest with the panel solicitor – and it didn't consider either to apply in the

circumstances.

- It added that even once legal proceedings are issued, it would require its terms of business to be agreed with a non-panel solicitor prior to any costs being covered, and that it reserves the right to not cover legal costs incurred by a non-panel firm without its knowledge or consent.
- It did, however, accept that it could have communicated better with Mrs T whilst the claim was being handled. Mrs T replied saying that because HDI hadn't progressed the claim – and due to the legal matter requiring specialist legal knowledge and it being time sensitive – she'd had no choice but to appoint her own legal representatives.
- Unhappy, Mrs T brought a complaint to this Service. An Investigator considered it and said due to a breakdown in communication between the parties, it was reasonable Mrs T wanted to appoint her own solicitor. He said HDI should consider appointing Mrs T's chosen solicitor and consider any costs already incurred.
- Mrs T accepted the Investigator's findings, but HDI didn't reply and so, the complaint has been passed to me for an Ombudsman's decision.

I issued a provisional decision on 2 June 2023, in which I said:

*"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I intend to reach a different outcome to the Investigator, and I'll explain why."*

*Cover for non-panel solicitor's costs*

*The key issue to be decided is whether HDI should cover the costs and disbursements Mrs T has incurred since instructing her own legal representative.*

*Our Investigator said the breakdown in communication between the parties should mean HDI considers covering the legal costs Mrs T has incurred. But I'm not persuaded that's a fair approach here. Whilst I will consider how HDI communicated with Mrs T later in my decision, the starting point for determining whether HDI should cover non-panel legal costs is the policy document which says under "Freedom to choose an appointed advisor":*

*"b) You may choose a qualified appointed advisor if*

*i. we agree to start legal proceedings or proceedings are issued against you.*

*ii. there is a conflict of interest."*

*I'm satisfied the policy is clear that a policyholder's freedom to choose their own legal representative is not absolute and applies only if legal proceedings are imminent or there is a conflict of interest. So, I've gone on to consider whether these apply.*

*Was there a conflict of interest or had HDI agreed to start legal proceedings?*

*From what I've seen, a conflict-of-interest argument hasn't been raised, and it's clear to me – from reading the correspondence between HDI and Mrs T - that HDI hasn't agreed to legal proceedings starting. So, what remains for me to consider is whether legal proceedings had been issued against Mrs T – and whether it's reasonable to direct HDI to cover the legal costs she's incurred by appointing her own legal representative.*

*Were there imminent legal proceedings?*

*Mrs T has said she issued a cease-and-desist notice letter to her neighbour the day after the alleged trespass occurred. This letter gives notice of an intention to issue legal proceedings should the activity not stop. The issuance of it doesn't amount to formal legal proceedings starting – and it's not evidence of legal proceedings being taken against Mrs T.*

*I've also considered that Mrs T says she received a "threatening" letter from her neighbour's solicitor at the end of April 2022. I haven't a copy to consider. So, based on the available evidence I'm not persuaded there's enough for me to conclude legal proceedings were imminent.*

*Furthermore, Mrs T has told this Service that her barrister said an injunction wasn't necessary. As an injunction would need to be applied for through the court, I'm more persuaded that Mrs T's barrister advising it wasn't necessary is evidence that court proceedings weren't imminent. In addition, Mrs T has said her barrister has only recently started pursuing a boundary declaration through the courts to avoid the issue being "a blight on their property". Given this application is taking place approximately one year after the initial alleged trespass took place, I'm not persuaded on the available evidence that it's reasonable to conclude legal proceedings were imminent at the time Mrs T appointed her own legal representative*

*Were there exceptional circumstances?*

*I've gone on to consider whether any exceptional circumstances apply which mean it would be fair and reasonable for HDI to deviate from the policy terms and allow Mrs T to appoint her own solicitor prior to legal proceedings being imminent.*

*Mrs T has raised a few points to argue why she considers it reasonable for HDI to cover her legal costs – namely, these are that she has more confidence in her own legal representatives; the case is too complex for the panel firm of solicitors; the panel firm solicitor is too far away.*

*I understand Mrs T has concerns about S's competency to deal with the legal matter – she's said the appointed solicitor is too junior to deal with what she considers to be a complex legal claim. Whilst I appreciate Mrs T feels strongly her legal claim would be better dealt with by their own solicitor and barrister, S has a duty to say if it isn't able to effectively deal with a legal claim of Mrs T's nature. But it hasn't said this. Furthermore, in the absence of persuasive evidence which explains why the claim cannot be dealt with by S due to its complexities, I'm not persuaded it's reasonable to say S isn't suitably qualified to deal with the legal claim. And whilst I acknowledge Mr T is a qualified legal professional and is perhaps better placed than most to comment on this, this alone doesn't persuade me HDI should cover the costs incurred in using their own legal representative before court proceedings became necessary.*

*Mrs T has also said that because S is too far removed from her property, it acting as her legal representative isn't a viable option. She said her barrister had to visit her property to fully understand the legal dispute and advise accordingly – something S couldn't do due to its remoteness. Whilst I appreciate there was a benefit to be had in having Mrs T's barrister physically attend the property, I haven't been provided with evidence which shows this was necessary beyond Mrs T's opinion about it. And so, I'm not persuaded S's geographical location should determine that HDI cover Mrs T's legal costs.*

*Finally, Mrs T has said case law allows her a general freedom of choice – but that's not the approach this Service takes. Whilst we have regard to the law, we are not bound by it. And we don't consider case law to be interpreted to mean a policyholder's rights to freedom of*

*choice extends to include all preparatory work before negotiation has failed and proceedings are imminent. And where the terms and conditions of the policy are clear – as I consider them to be in this case – we don't consider it fair or reasonable to expect an insurer to cover the costs of a non-panel solicitor before legal proceedings commence and where exceptional circumstances don't apply.*

*HDI has appointed S - a panel firm - and based on where the legal dispute was at the time of doing so, I'm satisfied it was entitled to so under the policy terms. HDI has agreed to cover the claim subject to it having prospects of success and so, it's done what I'd expect it to do. Ultimately, it's now up to Mrs T to decide whether she wants to continue with her claim using S as her legal representative.*

#### *Excess*

*Mrs T has complained that HDI has retained her £250 excess. Under "what is not covered" the policy says:*

*"The first £250 of any claim under insured event D b), You must pay this as soon as we accept your claim."*

*So, I'm satisfied the policy is clear that a policy excess is payable. HDI has accepted the claim (subject to the remaining terms and conditions) and has appointed a panel firm of solicitors. If HDI has already incurred costs in doing so, I don't consider it reasonable to ask HDI to return the excess to Mrs T – as the excess is to cover the first £250 of costs. However, if HDI hasn't incurred costs, and Mrs T isn't going to use the panel firm of solicitors, I consider it reasonable for HDI to reimburse Mrs T the £250 excess.*

#### *Claims handling*

*Whilst I agree with our Investigator that HDI's customer service fell short at times, I don't agree this was to such an extent it warrants HDI covering Mrs T's legal costs. In any event, HDI has already declined Mrs T's request to use her own legal representative, so it has already "considered" these costs. Instead, I've thought about whether it would be fair and reasonable to direct HDI to pay compensation to recognise the difficulties Mrs T experienced whilst making her claim.*

*With any claim the insurer needs to satisfy itself there is cover under the policy, and so HDI's request for further information from Mrs T isn't unusual – and taking just over two weeks to accept the claim isn't in my opinion unreasonable. Understandably though, a legal dispute is inherently stressful and so I appreciate Mrs T's desire for it to progress in a timely manner. It is, however, usual practice for the insurer to refer the legal claim to a panel firm of solicitors for a prospects of success assessment as the insurer are entitled to rely on the solicitor's expertise to determine if there is cover under the policy. But, here, it's apparent this process didn't happen as it should. HDI has said that S didn't receive the original instruction it sent in April 2022 – though it's not clear when this error was identified and subsequently rectified.*

*The final response letter dated June 2022 says S has confirmed safe receipt of instruction and that someone from S will be in contact with Mrs T. So, I've thought about whether Mrs T would have acted differently had this error not happened, but I'm not persuaded she would have done. I say this because approximately one week after Mrs T was informed S had been appointed by HDI, she instructed her own legal representative. But I'm not persuaded this would have given S sufficient time to review legal documents and draft a legal opinion. So, I think it's more likely that Mrs T had always intended to instruct her own legal representative*

*and that her decision to do so wasn't because of HDI's poor case handling – particularly as Mrs T wouldn't have known at the point of appointing her own representative that the instruction to S hadn't been received.*

*I've also thought about whether Mrs T would have potentially switched to the non-panel solicitors had they been instructed when they ought to have been but again, based on Mrs T's concerns about using them – as set out earlier in this decision - I'm not persuaded she would have done. So, whilst I acknowledge HDI's service fell short, I'm not persuaded Mrs T would have acted differently had things happened as they should.*

*I also understand Mrs T considers HDI's response time to her emails to have been too slow. HDI has said it would have been preferable to speak on the phone and for someone to have a hold on what was happening with the claim - and I agree. Had there been telephone calls, it's likely these could have alleviated some of the frustration Mrs T was feeling, and because HDI didn't always meet its service agreement timescales, I am satisfied it's fair to ask HDI to pay compensation – and in the circumstances I consider £200 to be reasonable.*

#### *My provisional decision*

*My provisional decision is that I intend to direct HDI Global Speciality SE to pay Mr and Mrs T £200 compensation.*

*If it hasn't already incurred legal costs and Mr and Mrs T aren't going to use the panel firm of solicitors, HDI should reimburse the excess Mr and Mrs T has already paid."*

#### *Responses to my provisional decision*

HDI responded to say it accepted my provisional findings. Mrs T also replied. In summary she accepted her legal representatives had been appointed before legal proceedings had started but she said her legal dispute had *now* reached a point where proceedings were imminent - and so she wanted assurance that HDI would agree to appointing her own solicitors moving forwards.

Our Investigator correctly explained the scope of my decision is limited to considering the complaint Mrs T initially brought to HDI and this Service. He advised Mrs T to get in touch with HDI to let them know legal proceedings were imminent so it could consider her request. I understand Mrs T has faced difficulties in getting an answer from HDI on this matter but I'm unable to comment on this further as part of this complaint.

Mrs T later added that she considered there to be a conflict of interest between HDI and S. She said S charges below market rates to stay on HDI's panel – and having lower costs is in HDI's interest as it minimises its outlay. She added that to be commercially viable, S employs junior staff and dismisses cases without consideration to keep HDI's costs down – which in turn means policyholders claims aren't given a fair opportunity.

Mrs T said proceedings could have been imminent as she'd had to involve the police to stop her neighbour from dismantling her boundary wall. Mrs T says she mitigated the situation by having her legal representative write to the neighbour. She says if that hadn't happened, an injunction would have been required – meaning proceedings were imminent.

She said S were appointed three months after the matter started and so she had no choice but to appoint her own legal representatives – she said her neighbour's solicitor told her to appoint solicitors immediately.

Last, Mrs S questions the fairness of 'second guessing' what she may or may not have done. She says she would have been more than happy for HDI to appoint their solicitors to avoid spending her own money on legal fees.

### **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 also carefully considered Mrs T's response to my provisional decision. Having done so, I won't be departing from my initial findings. I'm satisfied my provisional decision largely covers the subsequent points Mrs T, but for completeness I've addressed those I consider to be new.

Mrs T has said legal proceedings could have been imminent had she not taken steps to mitigate her position. Whilst I appreciate Mrs T might not have known if and how her legal dispute was going to escalate, at the time of instructing her legal representative legal proceedings *weren't* imminent and so, it remains that HDI isn't responsible for covering her representatives' legal fees in relation to pre-action work as exceptional circumstances don't apply here.

Mrs T has said there's a conflict of interest between HDI and S because there's a commercial relationship between the two parties. However, it's standard practice for LEI policies to give insurers the freedom to choose which solicitor to appoint for advice and assistance up to the time where legal proceedings are necessary – and so, the existence of a relationship doesn't mean there's a conflict of interest. Importantly, when a panel solicitor is appointed by an insurer, the solicitor is acting on the *policyholder's* behalf, not the insurer's – though the insurer is entitled to rely on the advice provided. And so, the panel solicitor is required to adhere to its professional code of conduct – like any other legal representative – and declare if there is a conflict of interest. Here, for example, there's no evidence to suggest S has had any prior involvement with Mrs T or her opponent, and so I'm not persuaded a conflict of interest exists in these circumstances.

Mrs T has said she would have been happy to use the panel solicitors had HDI appointed them within a reasonable time. But I must keep in mind that Mrs T has made numerous comments – as detailed in my provisional decision – as to why she considers S to be ill-equipped to deal with her legal dispute. This, combined with her decision to appoint her own legal representative soon after HDI had appointed S, persuades me it was more likely than not always her intention to appoint her own legal team to deal with the matter.

### **My final decision**

My final decision is that uphold this complaint and direct HDI Global Speciality SE to pay Mr and Mrs T £200 compensation.

HDI must pay the compensation within 28 days of the date on which we tell it Mr and Mrs T accept my final decision. If it pays later than this, it must also pay interest on the compensation from the date of my final decision to the date of payment at 8% a year simple.

If it hasn't already incurred legal costs and Mr and Mrs T aren't going to use the panel firm of solicitors, HDI Global Speciality SE must reimburse the excess Mr and Mrs T has already paid.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs T to

accept or reject my decision before 17 July 2023.

Nicola Beakhust  
**Ombudsman**