

## **The complaint**

Mr A and Mrs X's complaint is about a claim they made on their Royal & Sun Alliance Insurance Limited (RSA) legal expenses insurance policy.

All references to RSA include their claims handlers.

## **What happened**

Mr A and Mrs X made a claim on their RSA legal expenses insurance policy for cover to deal with a dispute with their neighbours and the company that owns the freehold of their property.

RSA arranged for their panel firm to assess the claim against that company, but the panel firm concluded the claim wasn't covered by the policy as it related to matters of company law. As for the remaining claims, RSA's panel firm assessed them not to have reasonable prospects of success, as required by the policy.

Mr A and Mrs X litigated the claims themselves to conclusion and were successful, but they incurred considerable costs in doing so. They want RSA to fund their costs in pursuing the claim RSA said was covered because it related to matters of company law because they feel RSA's stance on this was wrong.

Our investigator considered Mr A and Mrs X's complaint and concluded it should be upheld. He thought that the claim against the company that owned the freehold of Mr A and Mrs X's property should have been covered by the policy, subject to the remaining policy terms. He directed that RSA instruct a panel Solicitor to assess the merits of the claim, including whether it was proportionate to pursue, based on the information available when Mr A and Mrs X made their claim. The investigator said that if the assessment proves to be positive then RSA should pay Mr A and Mrs X's costs up to the limit of indemnity.

RSA have agreed to the investigator's findings, but Mr A and Mrs X have not. They say that if the assessment of their claim is positive, RSA should discharge all their costs which are more than the limit of indemnity available under the policy. They've also made some submissions about the prospects assessment, as directed by the investigator.

## **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.

Having done so, I intend to uphold Mr A and Mrs X's complaint for the same reasons set out by the investigator.

RSA has accepted the investigator's findings so it follows that they've also accepted they should have considered the merits of Mr A and Mrs X's claim against the company that owned the freehold of their property, rather than take the view this was a matter of company law so not covered under the policy. Because of this, I don't need to determine the matter as

it's now been agreed by RSA. The issue I need to consider is what RSA should do to put things right.

I appreciate that Mr A and Mrs X aren't comfortable with an unknown Solicitor assessing the merits of the claim they made as this opens them up to the risk that their claim might not be covered. I appreciate that they incurred over £50,00 worth of costs themselves and that the risk of now not being able to recover this based on a Solicitor's opinion might be daunting, but the recommendation the investigator made is not outside this Service's usual approach to matters of this nature.

Whilst Mr A and Mrs X made the decision to pursue the claim themselves, I can't say that RSA need to be responsible for the cost of this if it didn't meet the terms of the policy. As with most before the event insurance policies, Mr A and Mrs X's policy requires the policy to have reasonable prospects of success- so be more likely than not to win. This essentially translates to the claim having over 51% prospects of success at the time it was made. And it includes the requirement for the claim to be proportionate to pursue.

I know that Mr A and Mrs X aren't comfortable with that assessment being from either the panel firm or a Solicitor of RSA's choosing, but if things had gone as they should and RSA had accepted the claim as one that fell within cover, they would have been entitled to have the matter assessed by their own choice of Solicitor. That's because they would be responsible for funding the claim if it had reasonable prospects of success. So, it follows that they should be entitled to choose who assesses the claim. I think that principle is still applicable here and therefore I agree that RSA should appoint either the panel firm or their own choice of Solicitor to consider the merits of the claim Mr A and Mrs X made in the First Tier Tribunal.

The investigator directed that the firm RSA instruct should be provided with the information available in the claim up until April 2022, which is when Mr A and Mrs X first asked for help. I think that's the right approach. It wouldn't be fair for the relevant firm to be provided with everything that came out of the litigation thereafter nor indeed the outcome of it because it would paint a skewed picture of the evidence available at the time the claim was made. If RSA had accepted the claim, the assessment it would have obtained would have been based on all that was available at the time. As such, it's fair that Mr A and Mrs X shouldn't be given an unfair advantage at this point.

When making this determination, I've considered everything that Mr A and Mrs X have said but there isn't an alternative approach I consider to be fair in this case. And whilst I know that their own Solicitor felt they couldn't put a value on the merits of their claim mid-way through proceedings, that doesn't mean another Solicitor won't be able to. Indeed, such assessments are commonplace in insurance funded claims so I would expect a determination to be capable of being made, even if it's not necessarily a positive one.

I understand that Mr A and Mrs X are concerned that if the claim does have reasonable prospects of success, RSA will only pay their costs up to the limit of indemnity. They feel that RSA should discharge everything they've incurred. I understand their point, but I don't agree with it. It's clear that Mr A and Mrs X were prepared to fund the claim they pursued to conclusion, either with or without RSA's help. By doing so, they accepted the liability that followed. The purpose of this award is to put them back in the position they would have been in had RSA agreed to fund the claim. So, if the claim is one that is capable of cover, all Mr A and Mrs X will be entitled to is their costs up to the limit of indemnity. Because of this, I don't think RSA need to pick up any of Mr A and Mrs X's Solicitor's costs beyond this.

The other thing to note is that if the claim had been covered by RSA from the outset, they would have likely instructed their own panel firm to act for Mr A and Mrs X at lower rates,

meaning the cover might have extended further than the costs actually incurred and possibly meant they wouldn't have exceeded the indemnity limit. By awarding reimbursement of their reasonable legal costs actually incurred in this litigation (albeit on a reasonably incurred basis) at the hourly rate they were incurred, up to the indemnity limit applicable to the policy, I have tried to put Mr A and Mrs X back in the position they would have been in had things gone as they should. This strikes a balance between the possibility that they might have chosen to instruct their own Solicitors when proceedings became necessary. When thinking about the shortfall beyond the indemnity limit, I've taken into account the fact that Mr A and Mrs X would have gone ahead with the claim irrespective of RSA cover so this isn't something they should be reimbursed for.

### **Putting things right**

For the reasons I've set out above, RSA should:

- Instruct their panel firm or another suitably qualified Solicitor to provide a legal opinion on the merits of Mr A and Mrs X's claim in the First Tier Tribunal based on the information available in April 2022.
- The panel firm should not be told of the outcome of the proceedings Mr A and Mrs X pursued or be provided with anything outside the scope of what was available to Mr A and Mrs X in terms of evidence in April 2022.
- If the panel firm's opinion is that the matter had reasonable prospects of success, then RSA should reimburse Mr A and Mrs X for the reasonable legal costs they incurred in this litigation at the hourly rate they were incurred, up to the indemnity limit applicable to the policy. RSA are entitled to have those costs assessed. Mr A and Mrs X may challenge this assessment by obtaining their own cost assessment by a cost draftsman or apply to Court for a detailed assessment, if the matter cannot be agreed with RSA.
- If the panel firm concludes Mr A and Mrs X's claim doesn't have reasonable prospects of success or isn't proportionate to pursue, Mr A and Mrs X may challenge this by obtaining an opinion from a suitably qualified Solicitor, based on the same information RSA's Solicitor considered. Because of this anyone they choose to instruct must not have knowledge of or have been involved in the original claim. If the opinion is positive, RSA can accept it or instruct a suitably qualified Barrister to make a final determination of the merits of Mr A and Mrs X's claim.

**My final decision**

I uphold Mr A and Mrs X's complaint against Royal & Sun Alliance Insurance Limited and direct it to put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A and X to accept or reject my decision before 11 September 2023.

Lale Hussein-Venn  
**Ombudsman**