

The complaint

Mr F considers Royal & Sun Alliance Insurance Limited's (RSA) decision to withdraw cover under his legal expenses insurance (LEI) policy to be unfair.

Any reference to RSA includes the actions of its agent.

What happened

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

- Mr F has a LEI policy which is underwritten by RSA. He sought to make a claim under it to pursue two separate legal claims about the installation of his bathroom and the quality of his new kitchen in 2019 and 2020 respectively.
- RSA accepted the claims, but on receipt of legal advice – which said neither claim had reasonable prospects of success and that there were concerns about recoverability with one – declined cover.
- Mr F brought a complaint to this Service about RSA's decision. In June 2022, an Ombudsman upheld it saying she was satisfied Mr F had shown there was a valid claim and so, RSA needed to fund the instruction of suitable experts to consider the merit of the two claims, and the prospects of recovery for one where concerns had been raised. She also directed RSA to pay Mr F £2,000 compensation.
- RSA reconsidered both claims following the appointment of experts. But it withdrew funding on the basis that neither claim would be proportionate to pursue because the legal costs involved exceeded the value of the remedies sought.
- But Mr F said RSA's decision was unfair as it was based on outdated and inaccurate information – and so, it couldn't reasonably assess the value of the claims. He said the expert had also omitted relevant costings from their reports and so, RSA didn't have an accurate value of the claim.
- Unhappy with RSA's decision, Mr F brought another complaint to this Service. An Investigator considered matters and partially upheld it. She was satisfied RSA's panel solicitor had demonstrated the bathroom claim wasn't proportionate to pursue because even with a current claim value to measure against, litigation costs were still expected to exceed this amount.
- But she wasn't satisfied the same had been demonstrated in respect of the kitchen claim. And so, she said RSA needed to ask the expert to consider all the points Mr F had made after the expert finalised their report.
- The Investigator also said RSA should pay Mr F £300 compensation because she didn't consider it to have carried out necessary investigations at the earliest

opportunity and so, had caused the claim to be delayed.

- Both parties disagreed with the Investigator's outcome. RSA asked for an Ombudsman to consider whether it was reasonable for it to withdraw cover in respect of the kitchen claim based on it not being proportionate to pursue.

In summary, Mr F responded saying:

- RSA hadn't handled his claims well from the outset and had caused avoidable delays which in turn meant - owing to inflation - his claims are now subject to both higher legal fees and material costs, which has impacted the proportionality of pursuing his claim.
 - His claims weren't fully evaluated because the bathroom claim value didn't include both fitting and material costs, and the expert reviewing the kitchen claim acknowledged there were aspects of it they couldn't comment on.
 - He considers the solicitor's opinion - namely, that legal costs in respect of the bathroom claim would be approximately £15,000 - to be excessive. Mr F argues that if the claim had been dealt with in a timely manner, his claim wouldn't now have to be pursued through the Sheriff Court's Ordinary Procedure Rules which attracts higher litigation costs.
 - Legal fees have been incurred which he considers to be a result of him having to correct RSA and its panel solicitor's mistakes – and so, he doesn't think RSA should be able to use the policy indemnity to cover these costs.
 - It's unreasonable for RSA to cover legal costs in respect of the panel solicitors reviewing expert reports when he doesn't consider the reports to have been given due attention.
 - The issue regarding his kitchen warranty and the value it would add to his claim has never been addressed by RSA, despite him raising it when he first presented his claim.
 - He wants to be put back in the position he would have been in had his claim been dealt with in an acceptable manner – which is to have a new bathroom and kitchen installed to a suitable standard.
- Because the parties disagreed, the complaint was passed to me for an Ombudsman's decision. Having considered things, I issued a provisional decision – I've included an extract below.

"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.

Mr F has provided a wealth of information for this Service to consider. As an Ombudsman my role is to determine what is key to deciding the outcome of this complaint. And so, whilst I may not address every point Mr F has made, I want to assure him I've reviewed the information he and RSA has provided.

This complaint is about two claims – one regarding Mr F's bathroom, the other about his kitchen. Relevant to both claims is the overriding policy requirement that the claim has

reasonable prospects of success and is proportionate to pursue.

With regards to the latter, the policy makes it clear it doesn't cover legal proceedings where a reasonable estimate of the policyholder's total legal expenses is greater than the amount in dispute. It's on this basis RSA has withdrawn cover, and so I need to determine in respect of each claim whether it's decision to do so is fair.

Bathroom claim

As things stand, RSA has said - based on its solicitor's legal advice – the bathroom claim isn't proportionate pursue. As I understand it, this is its position whether the claim is valued between £2,250 - £3,330 (the original value) or between £7,000 - £8,000 (the claim value based on current material and labour costs).

Initially, RSA's solicitor said the original claim value meant it wasn't proportionate to pursue because if the claim went to Court, a Court was unlikely to award a sum greater than the lowest amount the remedial works could be completed for – which was £2,250. It added that this was a relatively modest sum when compared to the legal costs incurred to that point. Mr F raised concerns about the original claim value – saying it was inaccurate as it didn't include fitting costs. He said with this cost included the claim value was instead £4,846 - but as the quote was four years old, this would now be higher owing to inflation.

RSA asked Mr F to provide updated estimates for both the materials and labour costs – which he did. And the claim value was estimated to be between £7,000 - £8,000. Because the claim value was more than £5,000, RSA's solicitor said it would need to be pursued through the Sheriff Court's Ordinary Procedure – and as this would attract litigation costs of around £15,000, the claim wasn't therefore, proportionate to pursue.

But Mr F thinks this has led to an unfair result. His argument is that had RSA handled his claim fairly from the outset, it wouldn't have been delayed and so, there wouldn't have been an increase in material and labour costs – meaning his claim value wouldn't have exceeded £5,000 and be subject to the Ordinary Procedure Rules and the associated higher legal costs.

It's not in dispute that RSA's solicitor has provided a legal opinion on proportionality in respect of the original and current claim values. And I'm satisfied it was reasonable for RSA to rely on the solicitor's advice as to why the claim isn't now proportionate to pursue, but I do consider there to be some merit to the argument Mr F is making. I'll explain why.

To clarify, Mr F has said the correct claim value was £4,846 – and I haven't seen RSA dispute this because it acknowledges that the original claim value doesn't include both fitting and material costs. So, to me, a legal opinion on whether it was proportionate to pursue a claim of this value - £4,846 - should have been carried out but that hasn't happened and now can't.

Whilst I can't say with certainty what would have happened had RSA sought a legal opinion as to whether it was proportionate for it to pursue this claim value, whether the claim had prospects, nor the outcome of such a pursuit, I am satisfied that because of its handling of Mr F's claim and the avoidable delays, he's missed out on the opportunity to find out whether his claim would have been proportionate to pursue – and I think this needs to be recognised by RSA paying compensation.

Kitchen claim

The issue here is that Mr F says the expert report RSA's solicitor relied on to determine whether this claim is proportionate to pursue omits relevant costs and is therefore, not accurate.

Our Investigator agreed and recommended RSA revert to the expert to gain clarification on the outstanding issues. But RSA doesn't consider that to be reasonable - it says these costs are minimal and ultimately, wouldn't make a material difference to the issue of proportionality.

I'm currently minded to agree with our Investigator on this point. Whilst RSA might consider the outstanding issues to be of nominal value, it's not an expert and so, I'd expect it to obtain clarification from the expert on these matters to see if the expert's opinion on the damage and value of the claim changes. On receipt of this information, it should then reconsider whether the claim is proportionate to pursue.

Excessive legal costs

Mr F is unhappy that the cost of obtaining the expert reports has been covered using his policy's indemnity. But this is standard practice – and whilst he may consider it unfair, if it wasn't covered under his policy, this would be an expense that he would have had to incur. And so, I don't consider the inclusion of these reports as part of the overall legal costs to be excessive or an unreasonable use of the indemnity.

Compensation

Our Investigator said RSA should pay Mr F £300 to recognise that RSA hadn't carried out necessary investigations and had therefore, caused avoidable delays.

I agree compensation is warranted here for the same reason, but I'm also currently minded to increase this amount because of what appears to have been a lost opportunity on Mr F's part in respect of his bathroom claim and a fair assessment of proportionality being undertaken by RSA at the appropriate time. Keeping in mind Mr F's personal circumstances – particularly his state of health which RSA were aware of – I'm minded to direct RSA to pay him £1,000 compensation.

My provisional decision

My provisional decision is I uphold this complaint and direct Royal & Sun Alliance Insurance Limited to:

- Pay Mr F £1,000 compensation.

- Obtain an expert opinion on the outstanding issues in respect of the kitchen claim to determine the claim value. It should then consider whether the claim is proportionate to pursue based on this new information."

- RSA responded to say it had nothing further to add. Mr F replied – he reiterated his complaint points about RSA's handling of the claim and how this had prevented proportionality from being properly determined. He also didn't consider it fair for his policy indemnity to be used to fund obtaining the expert's opinion and a legal assessment on proportionality.

- Persuaded by Mr F's argument that using the indemnity limit to absorb these costs would impact any assessment of proportionality, I wrote to RSA explaining that I intended to say in my final decision that RSA should bear these costs, so that Mr F's indemnity limit isn't affected, and a fair assessment of proportionality can be achieved. This was also shared with Mr F.
- RSA replied to say it accepted this. Mr F responded – in summary he said:
 - He wanted confirmation that RSA were to bear the legal costs associated with the new assessment of proportionality as well as the expert report.
 - He thought another expert opinion was largely academic – as the claim was going to be greater than the Simple Procedure £5,000 limit.
 - He had concerns about how RSA would handle the claim going forwards – particularly how long it would take to action my direction to it.
 - He wanted to be able to clarify with RSA / its solicitor what had been missed previously when instructing the expert's report.

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.

Mr F provided a lengthy response to my provisional decision – I won't be addressing every aspect of it here – my intention isn't to be curt but is to reflect the informal nature of our service. And so, I've responded to what I consider to be relevant to deciding the complaint.

- RSA were informed that I intended to direct it to cover the costs of obtaining an expert opinion *and* the legal costs involved in obtaining a proportionality assessment. So, neither would be absorbed by his indemnity limit.
- Whilst Mr F might consider another expert opinion to be academic, ultimately, for RSA to fairly assess proportionality, it needs to know the actual value of the kitchen claim - including issues which Mr F considers were previously omitted. And I'm satisfied obtaining another expert opinion – and taking account of Mr F's concerns about what was previously omitted - remains a fair course of action.
- RSA will be aware of its responsibility as an insurer to handle claims promptly, and so, I expect it to act in accordance with this when obtaining an expert opinion and carrying out a proportionality assessment. Though hopefully unnecessarily, if Mr F has concerns about RSA's handling of his claim going forwards, he can raise a complaint with it and subsequently bring it to this service for consideration.

My final decision

My final decision is I uphold this complaint and direct Royal & Sun Alliance Insurance Limited to:

- Pay Mr F £1,000 compensation. RSA must pay the compensation within 28 days of the date on which we tell it Mr F accepts my final decision. If it pays later than this, it must also pay interest on the compensation from the deadline date for settlement to the date of payment at 8% a year simple.

- Obtain an expert opinion on the outstanding issues in respect of the kitchen claim to determine the claim value. It should then consider whether the claim is proportionate to pursue based on this new information. The costs incurred in obtaining an expert opinion and legal assessment on proportionality should be paid by RSA and not be deducted from Mr F's policy's indemnity limit.

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

Nicola Beakhust
Ombudsman