

The complaint

Mr S and Miss W are unhappy with what UIA (Insurance) Limited did following a claim they made on their legal expenses insurance policy.

What happened

In 2021 Mr S and Miss W sought assistance from their legal expenses policy in defending a claim for adverse possession of areas of land adjacent to their property. UIA initially accepted the claim but subsequently said it didn't think it was covered by the policy. A complaint about that has previously been considered by our service. Another Ombudsman issued a decision in May 2023.

She thought UIA had wrongly declined the claim and said, amongst other things, cover should again be provided for reasonable legal costs up to the indemnity limit in the policy. She said UIA would need to contact Mr S and Miss W's current solicitors to try and reach agreement on funding for the ongoing claim. And she made directions in relation to the costs they'd incurred in privately funding legal action during the period when cover was withdrawn.

Following Mr S and Miss W's acceptance of that decision UIA sent their new solicitors its terms of business and offered an hourly rate of £145. The solicitors responded a month later and said that rate was too low. Further discussions took place and in mid-July UIA offered to pay £244 an hour. That was agreed and the firm signed UIA's terms of business.

The solicitors provided further updates to UIA over the next few weeks and confirmed a tribunal hearing was scheduled for the end of August. They obtained an updated counsel's opinion on the claim's prospects of success which remained positive in relation to one area of land but thought prospects had dropped to 50% in relation to another. A few days before the hearing the solicitors said a revised offer had been received from the applicants which amended a previous offer made in November 2021. The solicitors said this now sought costs which was not favourable and "*clients would prefer to proceed*".

At the hearing possession of the disputed land was awarded to the applicant (I understand Mr S and Miss W were granted rights of way over it). Costs were awarded against them. UIA paid the indemnity remaining under the policy to Mr S and Miss W's solicitors. However, that left a significant costs shortfall. Mr S and Miss W thought UIA should be responsible for this (at the very least) as they thought it was delay in agreeing terms of business with their solicitor which led to the case progressing to a hearing instead of being settled on a more favourable basis.

Our investigator thought UIA was entitled to negotiate with Mr S and Miss W's solicitor over the hourly rate it would pay; agreeing a lower hourly rate could be helpful to a policyholder as they would obtain more benefit from their indemnity limit. He didn't think there had been any significant delay by UIA during that process. And in any case Mr S and Miss W had solicitors acting for them during this period. If they'd thought there were further steps that needed to be taken they should have advised them of that.

Mr S and Miss W didn't agree. They said if it hadn't been for the ongoing issues with UIA they'd have had more time to devote to the underlying legal case and more opportunity to discuss matters with their solicitor and barrister. They thought that would have led to an earlier settlement of the claim. They said the previous Ombudsman's decision said only a proportion of the legal fees incurred should count against their indemnity limit but that approach hadn't been applied to the more recent costs. And they said the UIA didn't warn them costs would exceed the indemnity limit.

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 appreciate this has been an extremely difficult experience for Mr S and Miss W. I can see that, aside from the financial costs incurred, they now need to move as they don't feel safe in their current property given what's happened. I was very sorry to learn about this. However, the issue I need to focus on is what UIA did when dealing with their claim. I'm not looking at issues considered as part of their previous complaint to our service. I'm deciding the further complaint they made about what UIA did from May 2023.

The relevant rules and industry guidelines say UIA has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably. In considering how that applies in this case I've looked first at the terms and conditions of Mr S and Miss W's policy. That does provide a policyholder with the freedom to choose their own lawyer where *"proceedings are issued against your or your family"*. I don't think it's in dispute that applies in this case. But the policy also says *"where you or your family choose to use their preferred representative we will not pay more than we agree to pay a solicitor from our panel"*.

However, the policy doesn't say what that rate is. So I'm not sure it would have been fair for UIA to simply restrict the rate it would pay to that amount. But I don't think that means it should pay any hourly rate requested by a non-panel solicitor. It's appropriate for an insurer to have some control over the costs charged as that impacts the premiums it will charge for providing cover. And, as our investigator said, keeping legal fees to a minimum means the policy indemnity limit is used more effectively and can go further. It also means there's more funds available to accommodate disbursements and adverse costs.

So I don't think it was unreasonable of UIA to try and negotiate the hourly rate it would pay Mr S and Miss W's solicitors. They suggest this process took many months. But in fact terms were agreed with their solicitor around two months after the decision on their previous complaint was reached. And following that decision UIA contacted Mr S and Miss W's solicitors within a week and offered to pay them the same hourly rate it had agreed with their previous firm. It doesn't appear that firm responded until 20 June when it said that rate was too low. By the end of June UIA had offered a revised blended rate of £190 an hour and following further discussion it suggested a rate of £244 around two weeks later which was accepted.

I don't think there's evidence of significant delay by UIA in this process. And in any event at the point the hourly rate was agreed there were still over five weeks before Mr S's and Miss W's tribunal hearing. So they still had an opportunity to discuss matters with their solicitors and counsel prior to that taking place (including understanding the position their solicitors and barrister were taking in relation to the claim). As a result I don't think the time taken to agree an hourly rate with their solicitor has adversely affected the progress of their claim. I also think if their solicitors felt there were opportunities to resolve matters at that time that's something they would have advised Mr S and Miss W about.

In addition, I'm aware Mr S and Miss W were represented by solicitors throughout. I understand prior to cover being reinstated (and terms agreed with their solicitors) they'd instructed them to act at minimum cost. But even on the basis of those instructions I think it's reasonable to say that if there had been opportunities to settle the claim on a more favourable basis the solicitors would have advised Mr S and Miss W of this.

Mr S and Miss W say UIA didn't tell them costs were likely to exceed the policy indemnity limit. However, it did confirm to them on 13 June what it had paid to date and the amount remaining to fund the ongoing claim. And it wouldn't have known at that stage what the applicant's costs would be (or that Mr S and Miss W would be liable for these). However, their solicitors did provide further information at the end of July on projected costs to conclude the claim which would have used up most of the remaining indemnity limit. I'm not clear if UIA passed that information on to Mr S and Miss W.

But I think it's reasonable to say those solicitors should in any case have been keeping Mr S and Miss W updated with their actual and projected costs. And, in any event, it's not clear there's anything which could have been done at that stage to significantly reduce their costs liability. The settlement offer from the applicant at that time included adverse costs. Mr S and Miss W believe negotiation could have avoided this but there's no legal advice in support of that position. In fact when their solicitors emailed UIA on 28 July they said *"this is not the sort of case where it is easy to make an offer that any tribunal would have regard to on costs"*.

I also note the solicitors told UIA following receipt of the revised offer from the applicant that *"clients would prefer to proceed"*. That also suggests to me the key reason the claim didn't resolve at an earlier stage was because Mr S and Miss W wanted to progress matters (presumably based on the positive prospects of success opinion counsel had provided). So even if UIA should have provided Mr S and Miss W with more information on costs and the indemnity limit I'm not persuaded that there was any different action they could have taken or, even if there was, that they'd have done so.

Mr S and Miss W say the previous decision said only a proportion of the legal fees incurred should count against their indemnity limit. And that approach hadn't been applied in relation to the more recent costs. The decision on their previous complaint did say UIA needed to cover the actual costs Mr S and Miss W incurred but only costs at the previously agreed rate should be applied against the indemnity limit (because as cover had been withdrawn Mr S and Miss W had no choice but to pay the full rate). However, in this case an hourly rate between UIA and the solicitors was agreed. So I think it's right it's those costs which should be deducted from the indemnity limit.

My final decision

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S and Miss W to accept or reject my decision before 1 May 2024.

James Park
Ombudsman