

## **The complaint**

T, a business, complains about a claim it made on its U K Insurance Limited ('UKI') legal expenses insurance policy.

T says UKI declined its claim unfairly.

All references to UKI in this complaint include their claims handlers.

T is represented in this complaint, but I shall refer to all submissions as being its own for ease of reference.

## **What happened**

There's a detailed history which predates this specific claim which I won't recite here. Rather I'll concentrate on the matters that relate to and are the subject of this particular complaint.

T ran a clothing business and leased a shop for this purpose. The claim that is the subject of this complaint was against a café that was situated next door to its shop. T said that significant unpleasant odours were escaping from the café into its own shop which caused its stock to smell and put customers off entering. Eventually T was evicted from its shop as it couldn't afford to pay its rent. T feels the café was responsible for its downturn in business and wanted to bring a claim against it.

UKI accepted T's claim in the first instance and asked its panel firm of Solicitors to consider whether the claim had reasonable prospects of success, as required by the policy. The panel firm considered the claim and concluded that, as T no longer had an interest in the shop its unlikely they would be able to bring a claim in nuisance against the café because the nuisance was no longer ongoing. Because of this it was felt the claim didn't have reasonable prospects of succeeding under the policy, so UKI declined to cover it.

T didn't agree with UKI's position and asked them to cover its claim. In response UKI maintained their position and said that if T wanted to, challenge the opinion received it would need to supply an opinion from a barrister at its own expense and they would reimburse T if that opinion showed there were reasonable prospects of success. When considering T's complaint, UKI acknowledged that there was a delay in T's claim being registered and cover being confirmed by about 3 weeks. UKI offered T £100 in compensation for this.

Unhappy, T said it had a positive barrister's opinion which supported a claim in nuisance. UKI noted the opinion and referred it back to its panel firm to consider. The panel firm said the opinion T was referring to was incidental to advice provided in respect of a different claim and didn't conclusively confirm the claim had reasonable prospects of success. Rather it said that a number of questions needed to be answered, namely that the losses T's business suffered were as a result of the smell from the neighbouring café (rather than any other cause) as well as other questions relating to the actual cause of the issue. The panel firm also said that without favourable expert evidence they didn't think T would be in a position to pursue a claim in nuisance and pointed out that the barrister thought that it was unlikely this sort of claim would be proportionate to pursue in any event. In closing, the panel

firm said that if T was in a position to provide evidence responding to the issues noted, they' would be happy to reassess its claim.

Unhappy, T complained to the Financial Ombudsman Service. Our investigator considered T's complaint but didn't think it should be upheld. T didn't agree, so the matter has been passed to me to determine.

### **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 won't be upholding T's complaint. I'll explain why.

The starting point is the policy terms. It's a requirement of virtually all legal expenses insurance policies that any intended claim has a reasonable prospect of succeeding. T's policy is no exception. That means its claim against the café needed to have over 51% prospects of succeeding and be proportionate to pursue in order for UKI to cover it.

We don't think this is unfair. Litigation can be expensive. A privately paying customer wouldn't want to bear the cost if advised it is unlikely to succeed or that it would recover less than it has paid out in costs. We wouldn't expect a legal expenses insurer to fund claims in these circumstances either.

Where an insurer has declined funding in such a case, it isn't for us to evaluate the merits of the underlying claim. Instead, and as the investigator explained, we look at whether the insurer has acted fairly. So long as they have got advice from suitably qualified lawyers, we won't generally question their reliance on that advice, unless we think it was obviously wrong or based on factual mistakes. UKI did this.

I'm satisfied that the person that provided the advice at the panel firm was supervised by someone who was suitably experienced in the area of law T was asking for help with and I've seen nothing that suggests her advice was based on factual mistakes. In addition, I've considered the advice of the barrister on the question of nuisance and agree that it supports the claim is unlikely to be proportionate and that there isn't at present enough evidence to say whether it would succeed. The barrister was also suitably experienced in the area of law T was asking for help with.

I appreciate that T doesn't agree with the advice it has received, but that's not something I can consider. If, as the panel firm has said, T were to provide the evidence the barrister said would be necessary to establish the whether an actionable claim in nuisance for damages (rather than an injunction) would likely succeed, they I would expect UKI to instruct the barrister consider the claim again, including obtaining advice about whether it was proportionate to pursue. Alternatively, if T provided an alternative reasoned opinion from a comparable barrister that was supportive of both the merits of its claim and that it was proportionate to pursue, then I would expect UKI to consider that. But as matters stand, I can't say UKI did something wrong by relying on the legal opinions they received.

I appreciate that T feels the position it finds itself in now is unsatisfactory particularly because the shop is no longer trading, and it has lost considerable sums, but that doesn't mean that UKI need to fund its claim or that the position they've taken is unfair.

In relation to the delay in UKI confirming its acceptance of T's claim, I agree that three weeks was too long and that this would no doubt have inconvenienced T. But I think UKI's offer of £100 in compensation goes far enough to address this and is fair. T is a business so can't

suffer distress. And given this isn't a claim that UKI have agreed to fund, I don't think the delay prejudiced T pursuing the matter through its policy in any event. If T hasn't accepted UKI's offer yet and wants to do so, it can do so by contacting UKI directly.

### **My final decision**

For the reasons set out above, I don't uphold T's complaint against U K Insurance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask T to accept or reject my decision before 18 April 2024.

Lale Hussein-Venn  
**Ombudsman**