

## The complaint

Mr and Mrs N complain that Fairmead Insurance Limited unfairly declined a claim under their legal expenses insurance (LEI) policy.

Where I refer to Fairmead, this includes the actions of its agents and claims handlers for which it takes responsibility.

## What happened

Mr and Mrs N pursued legal action under a LEI policy held with another insurer – who I'll refer to as Insurer A. The case was unsuccessful in court and Mr and Mrs N were ordered to pay adverse costs.

Insurer A said, as the policy's limit of indemnity of £100,000 had been exhausted by Mr and Mrs N's own legal costs, it couldn't satisfy the full costs order and Mr and Mrs N would be liable for the remainder – which amounted to around £60,000.

Mr and Mrs N thought Insurer A was in breach of contract and negligent because it gave instructions to pursue the case to court despite counsel's recommendation not to and it failed to discuss the risks involved in doing so. They made a claim to Fairmead under their current LEI policy to pursue a claim for professional negligence against Insurer A.

Fairmead accepted the claim and allowed Mr and Mrs N to appoint a solicitor of their own choice. The solicitor was of the opinion the claim enjoyed reasonable prospects of success, but they said a barrister should be instructed to provide more detailed advice on the merits. Fairmead accepted this proposed way forward.

In December 2021, a barrister's opinion was obtained which concluded that the claim didn't enjoy reasonable prospects of success. As this is a requirement for cover under the LEI policy, Fairmead said it couldn't fund the claim any further.

Mr and Mrs N obtained their own barrister's advice in April 2023 which concluded that the claim did enjoy reasonable prospects of success. They asked Fairmead to reconsider covering their claim.

Fairmead arranged for an internal review by a solicitor and determined the claim had been accepted in error. It said there was an applicable policy exclusion relating to contract dispute claims which says, *"the settlement payable under an insurance policy (the administrator will cover a dispute if your insurer refuses your claim, but not for a dispute over the amount of the claim)"*. Based on this, it declined to cover the dispute with Insurer A.

Mr and Mrs N disagreed on the basis that Fairmead had declined the claim using the wrong policy terms and conditions. They provided their policy booklet which didn't include the exclusion. They raised a complaint, which they brought to our service.

Our Investigator was satisfied the correct policy terms and conditions had been applied and that the exclusion existed. But she didn't think it had been applied fairly in the circumstances

of Mr and Mrs N's claim, as they weren't disputing the settlement payable under an insurance policy. Rather, they were alleging negligence and breach of contract arising from the way in which a claim had been handled under the insurance policy.

To put things right, our Investigator recommended that Fairmead pay £250 compensation. And to move the claim forward, she said it should either 1) accept the positive prospects assessment from Mr and Mrs N's barrister and progress the claim in line with the policy terms and conditions or 2) it could obtain a third and final barrister's opinion, which both parties would be bound by. If both Fairmead and Mr and Mrs N chose option two, our Investigator said Fairmead should put forward the details of three barristers it approves and allow Mr and Mrs N to decide which one it instructs.

Fairmead accepted the policy exclusion had been applied unfairly as the claim is essentially one of professional negligence rather than a disagreement about the settlement. It agreed the compensation awarded was fair. And it accepted option two in respect to progressing the claim.

Mr and Mrs N didn't agree with our Investigator. They remained adamant that the policy exclusion referred to isn't within their policy booklet and they didn't accept our Investigator's explanation about what policy terms applied to their claim.

Mr and Mrs N also didn't accept the proposal for option two. They said they'd lost trust in Fairmead, and they didn't want a barrister which Fairmead had a relationship with, nor did they want its panel solicitors to provide instructions. They said they wanted to appoint a barrister of their own choice and provide the instructions directly, and that Fairmead should pay for it.

Fairmead agreed to this in principle, but it was concerned about costs as the policy only covers reasonable and necessary legal fees and it could instruct a barrister for £400 per hour. But Mr and Mrs N's proposed barristers were charging in excess of £700 per hour. It suggested Mr and Mrs N top-up the difference between what Fairmead considered a reasonable hourly rate and what the barrister was charging. But Mr and Mrs N didn't think this was fair. There was also a dispute over whether the barrister should be a Kings Counsel (KC).

Mr and Mrs N said they'd instruct a barrister of their own choice and if Fairmead didn't pay for it, they would take it to court.

As neither party can agree on the redress of this complaint, it's been passed to me to decide.

### **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'd like to reassure Mr and Mrs N that whilst I may have condensed what they've told us in far less detail and in my own words, I've read and considered all their submissions. I'm satisfied I've captured the essence of the complaint and I don't need to comment on every point individually, or possibly in the level of detail they'd like, in order to reach my decision. This isn't meant as a discourtesy, but simply reflects the informal nature of our service.

I recognise Mr and Mrs N's strength of feeling about which policy terms and conditions should be applied to their claim, and the existence of the exclusion Fairmead sought to rely upon. But I won't be addressing this complaint point. This is because Fairmead has

accepted our Investigator's view that the exclusion doesn't apply to the circumstances of this claim. As there is no outstanding dispute in this regard, I don't need to make a finding.

Our Investigator awarded £250 compensation for the impact Fairmead's actions had on Mr and Mrs N, as they were distressed and inconvenienced by having their claim declined. Both sides have accepted this outcome and, for clarity, I think it's a fair amount to resolve things.

What I need to decide is how Fairmead should put things right for the claim moving forward.

As it stands, there are two conflicting barrister's opinions on the claim's prospects of success; one is supportive, the other is not. Both barristers are suitably qualified with relevant experience, and both have provided a detailed, reasoned opinion based on the same set of facts and evidence. So there is no reason why one opinion should carry more weight than the other.

It's for this reason I agree with our Investigator that a third and final barrister's opinion should be sought on the prospects of successfully pursuing this claim, and both Fairmead and Mr and Mrs N will be bound by it. This means that if the barrister is of the opinion the claim enjoys reasonable prospects of success at 51% or above, Fairmead must accept the claim. And if the barrister is of the opinion the claim has less than 51% prospects, Fairmead can decline the claim.

I appreciate Mr and Mrs N and Fairmead can't agree on a barrister. But I'm satisfied our Investigator has clearly explained the options available, which are:

- 1) Fairmead will put forward three barristers which it approves, and Mr and Mrs N can choose one, or
- 2) Mr and Mrs N can obtain an opinion from a barrister of their own choosing, but Fairmead will only pay up to £400 per hour.

I'm satisfied these options are fair. As Fairmead are paying the costs, it's reasonable for it to have a say in the amount being charged. And it has a responsibility to ensure the costs being incurred are reasonable and necessary. As Fairmead can obtain a barrister's opinion for £400 per hour, it's not unfair for it to restrict the costs to what it would pay if it was using its own preferred chambers. This is in Mr and Mrs N's best interest, as the cost of this advice will come out of their indemnity limit and it's important that costs are kept low to ensure they have enough funds to pursue the claim if prospects of success are established.

Whilst I understand Mr and Mrs N has lost trust in Fairmead, barristers are independent, and they have their own rules and regulations to ensure they give unbiased and impartial legal advice. So, whilst Fairmead may have a relationship with the chambers in order to keep costs low, this won't impact the quality of the advice provided or the outcome the barrister will reach.

I'm aware Mr and Mrs N have concerns about Fairmead's panel solicitors providing the instructions to the barrister, which I understand is one of the reasons why they want to instruct their own barrister on a direct access basis to ensure they have sight of what information is being passed on. It's not unusual for an insurer to obtain the barrister's advice through their panel solicitors, and I don't think Mr and Mrs N's concerns are necessarily warranted.

But I do think both sides should have sight of and input over the instructions to the barrister. This means, regardless of which option Mr and Mrs N choose, they should agree instructions with Fairmead's panel solicitors before sending these to the barrister. This is because both

parties will be bound by and impacted by the outcome of the legal opinion, so it's only fair that both sides are aware of what information the barrister is being provided with and that the process is transparent.

There's also been disagreement over whether the barrister should be a KC. I see no reason to insist on a KC here, but certainly the advising barrister should be comparable to and no less qualified than the two barristers who've already provided an opinion. So it may be best to appoint a more experienced barrister at least.

### **My final decision**

For the reasons I've explained, I uphold this complaint and direct Fairmead Insurance Limited to:

- pay £250 compensation,
- pay for a third and final barrister's opinion on the following terms:
  - 1) put forward three barristers which it approves, and Mr and Mrs N can choose one, or pay up to £400 per hour for a barrister of Mr and Mrs N's own choosing;
  - 2) ensure the barrister is at least comparable to and no less experienced than the two barristers who've already provided an opinion;
  - 3) ensure both sides have sight of and input over the instructions to the barrister;
  - 4) be bound by the advice of the barrister, meaning if supportive, cover under the legal expenses insurance policy will be put in place.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N and Mrs N to accept or reject my decision before 2 July 2024.

Sheryl Sibley  
**Ombudsman**