DRN-5123606

The complaint

Mr and Mrs R complain about what The National Farmers' Union Mutual Insurance Society Limited did after they made a claim on their legal expenses insurance.

All references to NFU include its agents and claims handlers. Although the policy is in joint names (and Mr and Mrs R are represented by solicitors) as the claim relates to Mrs R for ease I'll mainly refer to her in this decision.

What happened

In November 2022 Mrs R sought assistance from her policy with a professional negligence claim she wanted to pursue against her former solicitors. She thought their negligent advice meant she would be liable for significant capital gains tax on shares she'd sold. Having reviewed matters NFU confirmed this was a claim the policy could cover. Mrs R said she wanted to use her own solicitor (H). NFU agreed to consider their appointment and asked them to complete a claims management report (CMR) in February 2023 which included confirmation the claim had reasonable prospects of success.

H returned the report in March 2023. It thought the claim did have good prospects of success. There was further discussion of what the costs to pursue it would be, what the value of the claim was and what hourly rate would be paid to H. NFU offered to pay in line with the court guideline rates for 'London 3' based on Mrs R's location but H thought a much higher amount should be paid. NFU then said as an HMRC investigation into Mrs R's tax liability hadn't yet concluded (and was unlikely to do so for some time) it wouldn't be progressing the claim in any case until her loss had crystallised. H expressed concern about the impact of that on limitation but NFU didn't change its position.

In July 2023 HMRC's investigation concluded and confirmed the additional tax that was due (plus late payment interest). NFU asked for a further CMR to be completed which H objected to as there had been no significant change since the previous one. NFU reviewed matters following a complaint from Mrs R. It agreed to increase the hourly rate to one based on H's location ('London 2').

H remained unhappy with the hourly rate as the amount charged by the solicitor who would have conduct of the case was significantly higher. It thought the complexity and value of the claim justified that. NFU didn't agree to a higher rate. H said in October 2023 it would accept the proposed hourly rate but reserved the right to revisit this matter if necessary once proceedings had concluded.

It then suggested amendments to the terms of appointment NFU had sent it. Following further discussion some of those issues were resolved but H remained concerned about the position in relation to counsel's fees and reporting requirements to NFU. It said the fee earners involved with this claim couldn't comply with them as they wouldn't be aware of the wider issues they might involve. As it wasn't possible to reach agreement on those points the claim wasn't pursued under the legal expenses policy.

NFU accepted it had caused some delay to the claim and on occasion unnecessary information had been requested from Mrs R. It paid £250 in recognition of the impact of that on her. It also accepted the second CMR wasn't required and said it would cover any costs incurred which related to this. However, it thought it was reasonable to ask H to sign its terms of appointment and didn't accept this unfairly restricted Mrs R's freedom to choose her own solicitor; numerous non panel solicitors had agreed to work under its provisions.

Our investigator didn't think it was unfair NFU asked H to sign the terms of appointment and it acted reasonably in response to the concerns H raised about these. He agreed it was right NFU should reimburse the cost of the second CMR. But he thought it should also pay costs associated with the first CMR. And he agreed there had been some avoidable delays in the claim being progressed and thought NFU could have done more to clarify points. Taking into account the impact on Mrs R he said the compensation should be increased to £400.

NFU agreed to his recommendations. H (on behalf of Mrs R) didn't agree. Its response focussed on the issues with the terms of appointment and in summary it said:

- As NFU had agreed to make some amendments to the terms of appointment and didn't have a panel firm qualified to deal with the matter it was unfair it hadn't engaged with it on the outstanding issues.

- It was unreasonable to expect Mrs R to find another solicitor who was willing to accept those terms. This undermined her freedom of choice as it meant she might have to choose a solicitor who wasn't the best one to handle the case.

- This was a complex and high value professional negligence claim requiring a level of expertise and resources not widely available in the legal market. It wasn't realistic to assume there would be other solicitors available who could handle the matter at a rate below the average for such work or under unfavourable terms.

- It would be a significant burden on Mrs R to find an alternative lawyer which would delay her ability to receive timely and effective legal support when she already had a solicitor who was able to meet her needs. It wasn't reasonable of NFU to accept Mrs R could use a non-panel solicitor but then frustrate the process to bring that decision into effect.

- It drew attention to relevant legal and contractual principles including that of insurance as a contract of utmost good faith. It didn't think NFU was acting in line with by not accepting proposed amendments to the terms of appointment. And it referenced the Consumer Rights Act 2015 and '*Braganza v BP Shipping*' in support of its position.

So I need to reach a final decision.

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.

The relevant rules and industry guidelines say NFU has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.

I appreciate in correspondence H has set out detailed concern. But I don't think it's appropriate or in line with the informal nature of our service to respond to every point raised. Instead, I've sought to focus on what appear to be the key outstanding issues taking into account the points made in response to our investigator's view.

Policy terms

I've looked first at the terms and conditions of Mrs R's policy. This does provide cover for contract disputes and I think it's accepted the claim she has against her former solicitors would, in principle, fall within that insured event. The policy also requires that "*for civil claims it is always more likely than not that an Insured Person will recover damages (or obtain any other legal remedy which [claims handlers] have agreed to) or make a successful defence".* Mrs R's solicitors confirmed in March 2023 the claim did have prospects of success and the loss to Mrs R was confirmed when the HMRC inquiry concluded in July 2023. So I don't think it's in dispute that term of the policy has also been met.

But the claim didn't then progress under the legal expenses policy because Mrs R wanted H to represent her and agreement couldn't be reached on the terms of appointment. In relation to that the policy says "*A representative will be appointed by [claims handlers] and [claims handlers] will have direct contact with the representative. However, the Insured Person shall be free to choose an alternative representative by sending [claims handlers] the suitably qualified person's name and address*". And "*the representative must cooperate fully with [claims handlers] at all times and will represent the insured person according to [claims handlers]'s standard terms of appointment."*

Our normal approach, which takes into account the relevant regulations, is that a policyholder should be free to choose their own solicitor from when legal proceedings need to be started. However, this policy appears to go beyond the legal position in allowing the insured the freedom to choose their own representative at any time. In any case, as Mrs R's solicitors confirmed in July 2023, they wanted to issue a letter of claim I think she'd likely have the right to choose her own solicitor from that point regardless.

But while the policy allows a policyholder to choose their own representative it's a requirement that they agree to the claims handler's standard terms of appointment. I don't think that's unreasonable in itself. Where a non panel firm is involved with a claim it's right an insurer sets out its expectations of what service will be provided and what it will do in return. In this case there was an initial dispute over what hourly rate should be paid. The terms of appointment do say that it will pay "*your costs at £100 plus VAT per hour unless agreed otherwise".* However, the policy terms are silent on the rate that will be paid. So this isn't something a policyholder would have been aware of when taking out cover. And in those circumstances I'd normally consider what rate would be fair on the basis of evidence provided by the policyholder, solicitor and insurer.

In this case NFU agreed (after negotiation) to pay 'London 2' rates for the claim. Mrs R's solicitors don't feel that's high enough but I don't think that's material to the outcome of this complaint. H agreed to work for that rate in order to move matters forward though reserved the right to raise matters again if this remained an issue at the conclusion of the claim. So as this isn't a current issue (and there's no current loss to Mrs R in relation to it) I don't need to determine whether NFU acted fairly in relation to the rate it offered.

Changes to the terms of appointment

What I do need to consider is the approach NFU has taken to other aspects of the terms of appointment. The areas of dispute relate to the requirement for H to notify NFU immediately if its regulator investigates, suspends or withdraws its authorisation, it's no longer able to lawfully undertake activities described in the terms of appointment or if it becomes insolvent. And to notify NFU immediately of complaints relating to its actions, which are subject to the Financial Conduct Authority regulatory regime or otherwise of a high profile nature. Further to notify NFU as soon as reasonably practicable of other complaints which are outside of that definition and deal with them in line with relevant requirements.

NFU weren't prepared to amend those clauses of the terms of appointment so I've considered whether that was fair. In doing so I've taken into account the relevant law and principles that H has referenced in its submissions. I am also aware of the case of '*Braganza vs BP Shipping*' which H specifically referenced. I appreciate there the Supreme Court concluded the relevant contractual clause was subject to an implied term requiring the business in question to act rationally. But ultimately, and as required by our rules, I'm deciding in this case what's fair and reasonable in all of the circumstances of the case having taken into account, amongst other things, relevant law and regulations.

Having done so I've thought first about whether there's a justification in itself for the inclusion of the disputed clauses in the terms of appointment. I think there is. There are clearly risks associated with funding being provided to a firm which has regulatory or compliance issues. And I think it's reasonable NFU would want to know about those issues in order to decide whether there were steps it needed to take to protect itself (and its policyholder) against those risks.

I've gone on to review H's specific objections to the inclusion of the terms in this case. It says that's because the fee earners with conduct of the case wouldn't be aware of issues that fell outside of the specifics of this claim (and the terms were therefore too broadly drafted). But I think it's unlikely the fee earners dealing with the claim would be unaware of H becoming insolvent or having its authorisation withdrawn or suspended by its regulator. I appreciate they might not personally be aware of other investigations the regulator was carrying out or of complaints that had arisen which didn't specifically relate to this claim. But I do think that's something H would corporately be aware of given the regulatory requirements on a legal firm including the need to identity any risks in how it has assessed and sought to resolve complaints.

It therefore seems reasonable H would be able to put in place systems and processes that enabled it to meet NFU's reporting requirements even if these weren't matters that the fee earners involved with this claim were specifically aware of. I'm aware from other complaints these are terms other non-panel firms have been able to agree to and meet without apparent difficulty. I recognise NFU did agree other amendments to the terms H suggested. But I don't think doing so meant it was bound to accept all the changes H wanted to be made. And for the reasons I've explained I don't think it was unfair it didn't agree to amend these provisions in this case.

I appreciate H was also concerned about a clause in the terms requiring it to use the barrister's chambers listed in the agreement in order to obtain preferential rates NFU had negotiated. I don't think it's unreasonable NFU included that requirement in its terms. Ensuring preferential rates are used helps reduce outlay which counts against the policy indemnity limit meaning a policyholder's legal cover will go further.

I understand in this case H wanted to instruct counsel who specialised in professional negligence and tax issues and didn't believe the firms NFU had negotiated rates with were capable of advising. But the terms of appointment say a preferred firm should be used "*wherever possible*". And the requirements in relation to a non-preferred firm apply "*in the event you wish to use an alternative barrister*". I don't think they would apply in a situation where the barristers with who NFU had agreed rates were unable to deal with the claim.

So, if there was evidence to show that NFU's preferred firms were unable to provide advice on the matter, I'd expect NFU to consider instructing the barrister H identified. But in this case H doesn't appear to have evidenced that. In particular it doesn't appear to have approached the firms listed in the terms of appointment (which it agreed it would do in an email to NFU on 1 November 2023). So there's no confirmation from those firms that they don't have the expertise to deal with the matter.

Overall, I think NFU did respond reasonably to the points H raised about the terms of appointment. I agree it had discretion to make changes where appropriate which it did in relation to some points. But I think it had reasonable grounds for deciding not to accept other changes H wanted. I recognise as a result H didn't feel able to agree to the terms of appointment. I accept that means Mrs R would need to find an alternative solicitor if she wanted her claim to be funded by her legal expenses insurance. And that would have put her to additional effort. But I don't think that's come about because of anything NFU got wrong. It follows that I don't think NFU did frustrate her ability to choose her own lawyer.

Claims handling

Turning to the more general handling of the claim I agree there were delays in NFU progressing the matter. And while I think it was reasonable of it to say the loss to Mrs R would need to be confirmed prior to funding being provided I think that issue could have been raised earlier in the process. I also agree NFU didn't need to ask for a second CMR given the confirmation H provided about the position not having changed from the previous one (and the relatively short time period between the two). And I'm unclear why NFU didn't agree terms for the completion of the first CMR given it had requested this to establish whether the claim had reasonable prospects of success which is something it would normally have funded a panel solicitor to provide.

However, I think the issues with the CMR are addressed by NFU's agreement to cover the costs associated with both reports. And while I appreciate Mrs R will have been caused some unnecessary distress and inconvenience by what NFU got wrong in the handling of her claim I think the £400 it's now agreed to pay does enough to recognise the impact on her of that. I don't think there's more it needs to do to put things right here.

I know Mrs R is also seeking reimbursement of costs H incurred in raising concerns with NFU and in subsequently bringing a complaint to our service. Our rules do allow us to direct a business to cover some or all of the costs reasonably incurred by the complainant in respect of a complaint. But the rules also make clear that awards of costs are unlikely to be common because in most cases complainants should not need professional advisers to bring their complaint to our service. In this case I understand why Mrs R may have wanted to seek professional assistance in bringing this complaint (and in raising her concerns with NFU) but I don't think that was something she needed to do. So I don't think this is an appropriate case in which to make an award of costs against NFU.

Putting things right

NFU will need to reimburse Mrs H for costs she incurred in relation to the completion of both the first and second CMR's. It will also need to pay her £400.

My final decision

I've decided to uphold this complaint. The National Farmers' Union Mutual Insurance Society Limited will need to put things right by doing what I've said in this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R and Mr R to accept or reject my decision before 4 February 2025.

James Park
Ombudsman