DRN-5275057

The complaint

Mr W's complaint is about the handling of a legal expenses claim by The National Farmers' Union Mutual Insurance Society Limited ("NFU").

What happened

In January 2020, Mr W made a claim under his policy with NFU, as he wanted to take legal action against a storage company that caused damage to his possessions. The claim was covered and the legal matter was progressed. In September 2023, the other party made a global offer to settle the claim in the sum of £25,000. Mr W's solicitors advised they thought the offer was reasonable, as they had previously put forward an offer on behalf of Mr W to settle for £13,000. The solicitors told NFU that the offer therefore represented a maximum of £13,000 damages and the rest would go towards Mr W's costs.

Mr W contacted NFU and confirmed he wanted to accept the offer and was concerned about it being withdrawn. NFU confirmed it was happy for the offer to be accepted. Mr W was, however, unhappy with the proposed split between damages to be paid to Mr W and costs to be reimbursed to NFU from the £25,000 but NFU agreed to the settlement agreement proceeding and the split to be determined afterwards. The offer was therefore formally accepted in October 2023. In November 2023, Mr W said he did not agree that any part of the settlement is payable towards his costs and that he should therefore receive the full £25,000. The settlement agreement was signed and the other party paid the settlement in December 2023.

As the split of the settlement payment was in dispute, the panel solicitors held the payment, pending agreement between NFU and Mr W.

Mr W is very unhappy about this and complained to NFU. He says the settlement agreement with the other party stated there was no order for costs, so was not in the same terms as the previous offer, and so the entire settlement amount is payable to him. He also made a complaint about the solicitor's conduct of his case and I understand NFU has agreed to cover a claim for professional negligence against them. Mr W therefore says the solicitor's advice cannot be relied on.

I can see that Mr W also asked that another firm of solicitors be appointed under the policy to deal with his dispute with the storage company but NFU said that, as the claim had been settled there was no legal dispute anymore, and in any case the indemnity limit had been reached.

NFU says that it is responsible for paying Mr W's solicitors costs as agreed and in line with the policy terms and so any costs recovered from the other party can be recouped by NFU; the costs are not paid to the solicitors (as they have already been paid for their work by NFU) but paid back to NFU. NFU says the solicitors confirmed the value of Mr W claim was £13,000 and that they had also advised Mr W that a global offer is inclusive of costs and damages. It therefore considers it is entitled to the £12,000 as part recovery of its outlay.

In April 2024 it was agreed that £13,000 would be released to Mr W but the remainder is still being held by the solicitor pending resolution of this complaint.

As NFU did not change its position about the amount of costs to be recouped and the solicitors are still holding the rest of the payment, Mr W referred his complaint to us.

One of our Investigators looked into the matter. He did not recommend the complaint be upheld because he thought it had been made sufficiently clear the global offer was for damages and costs; and the solicitors had advised that Mr W's claim was worth £13,000, so it was not unreasonable for the remaining £12,000 to be deemed to be payment in respect of costs.

The Investigator also said that professional negligence is ultimately a matter for the court and any unproven allegations of negligence are not a reason for NFU not to accept the solicitor's advice on the value of the claim. In any case, the solicitors would not have anything to gain from undervaluing Mr W's claim, as it does to impact how much they will be paid.

Mr W does not accept the Investigator's assessment. He has made a number of points in support of his initial complaint and in response to the Investigator. I have considered everything he has said but have summarised his main points below:

- He never agreed to any split of the money between costs and damages. The offer letter from the other party said that the offer amount included payment of his costs but the settlement agreement does not. It is the settlement agreement that is the binding contract and this says he will receive £25,000.
- In breach of his policy, NFU failed to liaise with him before he signed the agreement, leaving him to believe that the signed agreement would be complied with.
- NFU and the solicitors breached the *"working together*" agreement and the solicitors were conflicted, so their advice on the offer and apportionment of the settlement should not be relied on. NFU has provided indemnity to sue the solicitors for professional negligence.
- His claim was never worth £13,000. This was a desperate reduction of the value of his claim as his indemnity limit under the policy had been used up. In any case the offer was made to him and not NFU.
- If the remaining £12,000 is not paid out to him, he intends to report the matter to the Police.
- The policy does not say that NFU can take money from him. If there is an issue with regard to the costs, this is between the solicitors and NFU.
- NFU has not adhered to its own complaint process. If his complaint about this had been responded to in September 2023, it would have been resolved before he signed the settlement agreement. Instead, NFU colluded with the solicitors behind his back. It was unprofessional of the solicitors to discuss this with NFU.
- NFU said it would get independent counsel's advice on the value of his claim but didn't. We should direct that NFU does so, even though there is no doubt he is entitled to full damages.
- He was forced to accept the derisory offer from the other party due to NFU's mishandling of his indemnity.

Procedural matters

As Mr W does not accept the Investigator's assessment, the complaint has been referred to me. However, Mr W has asked that a final decision is not issued on his complaint pending certain action he wants taken. I have set out below a summary of the issues Mr W considers

mean the complaint should not yet be finally determined and my response to each of them:

1. Mr W wants an explanation as to why NFU breached his policy and its regulatory obligations by not following the proper complaint process when he raised his concerns in September and November 2023. Mr W says NFU will not be prejudiced by any delay while this is investigated and answered.

Complaint-handling (or any alleged failure to handle a complaint properly, or at all) is not a regulated activity in its own right, so I cannot consider NFU's handling of Mr W's complaint, or whether it should have started a formal complaint procedure in September and/or November 2023. I do not therefore consider this a reason to delay the final decision on this matter.

2. The investigator didn't give him enough time to respond to his assessment and he has made a subject access request for documents relating to his matters, which needs to be fulfilled before the decision is issued.

The Investigator issued his first assessment in October 2024. The Investigator has also responded to a number of points raised by Mr W since. Mr W has provided a full and comprehensive response to the assessment and in support of his complaint. Mr W has also received copies of all the documents relied on by the Investigator in his consideration of the complaint. I am satisfied therefore that Mr W has had sight of all relevant documents and evidence provided by NFU relating to this complaint and that he has had a fair opportunity to provide any evidence or arguments he wants in response to the Investigator's assessment. I do not therefore consider the final decision needs to be stayed for these reasons either.

3. The consideration of this complaint has been influenced by previous issues with our service relating to a previous complaint he referred to us which was decided in 2016. He does not want a final decision on this case until a letter from his M.P., sent to us in February 2020, which relates to the handling of the 2016 complaint, is answered.

My colleagues have answered Mr W regarding his M.P.'s correspondence. The issues that he refers to in relation to a previous complaint do not have a direct bearing on this complaint. I do not therefore consider the decision on this case should be stayed for this reason.

Mr W has not withdrawn the complaint, or confirmed he agrees with the Investigator's assessment, which is why the matter has been referred to me. Given all the above, I think it is right to proceed to the final determination in line with our process and our obligations to consider complaints in reasonable time.

Finally, Mr W has also raised some other issues with the handling of the legal expense claim but I can only address the complaint points raised which led to NFU's final response letter in early 2024.

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.

Is DAS entitled to any part of the settlement to recoup its costs?

The policy provides cover for Mr W's reasonable legal costs but also requires him to do all he can to minimise the costs and to "*take every step to recover costs and expenses… that we have to pay and must pay us any amounts that are recovered*".

Therefore, I agree that if the settlement received was to cover damages and costs, then Mr W is only entitled to retain the amount that is for damages.

There had been ongoing negotiation between the parties via their respective legal representatives. This culminated in the offer letter from the other party dated September 2023, which said:

> "*We confirm that our client is willing to pay the sum of £25,000 to your client in settlement of this dispute.*
>
> *We have deliberately expressed this offer as a global sum, with no distinction between the sum offered to your client by way of settlement of his claim and the sum offered in respect of his legal costs. There are two reasons for this:*
>
> 1. *The lack of merit in your client's claim; and*
> 2. *The extraordinarily high level of his legal costs.*
>
> *In relation to your client's claim, the Claim Form continues to state that the claim is valued in excess of £50,000. This is clearly unsustainable in light of the expert evidence of the single joint expert … which ascribes a maximum potential value to your client's claim of only £11,294.50.*
>
> *In light of this, it is surprising that your client's most recent settlement offer (which postdates* … [the] *report) was to accept £13,000, which is more than the maximum potential value of his claim. Accordingly, your client's previous offers afford him no costs protection, but instead illustrate his wholly unrealistic and unreasonable approach to this litigation."*

Mr W accepts this offer letter said the settlement was to include a sum towards his costs but says the wording of the settlement agreement does not reflect this.

The terms of the settlement, agreed by a settlement agreement, stated that the other party will "*pay to* … [Mr W] *the total sum of £25,000"* in "*full and final settlement of his claim"* and that the *"proceedings shall be dismissed with no order as to costs".* The agreement also said: "*the parties shall each bear their own legal costs in relation to the dispute and this agreement".* **A**nd the consent order that dismissed his claims also stated there was to be no order in relation to costs.

Mr W says that the fact the settlement agreement says there is no order for costs can only mean that the settlement payment is entirely in relation to damages and no part of it is to be apportioned to costs. Mr W says the offer was therefore varied by the wording of the settlement agreement, which is the only legally binding document**.** Mr W has provided a copy of a judgment on an unrelated case**,** which says that a settlement agreement can supersede a prior offer and acceptance, which he says supports his position.

I do not agree that this is a reasonable interpretation of the wording of the settlement agreement. I will explain why.

The offer letter and the explanation in that letter that it was a global offer to include costs and damages was accepted by Mr W via his solicitors. It was then drawn up into the settlement agreement. There were no other offers or counteroffers between the letter of September 2023 and the settlement agreement being signed.

The settlement agreement set out that each party should bear their own costs. This means that it is for Mr W to sort out his costs position from the monies paid to him. How Mr W pays his costs (whether he had indemnity under an insurance policy or was paying privately) is not the other party's concern. The other party was paying the £25,000 as a global settlement and it is clear to me that the payment of £25,000 was to extinguish any and all claims Mr W might be able to make against the other party, including for his costs of pursuing the matter.

In my opinion, the settlement agreement reflects the offer in the letter cited above, as it reflects that the other party would pay the sum of £25,000 in full and final settlement and would not pay any separate sum towards costs.

I see no validity in Mr W' argument that this means the terms of the offer had been varied such that he is entitled to the entire £25,000.

I therefore consider it is fair and reasonable that DAS recover some of the amount towards costs. I will address whether the amount it is claiming is fair below.

Is the apportionment of £12,000 towards costs reasonable?

Mr W says the solicitors were conflicted and therefore their advice on the value of his claim should not be accepted. Mr W also says his claim was worth more than £13,000 and therefore implies that even if some costs are to be recovered out of the settlement it should not be £12,000. I have considered the evidence provided around the value of Mr W's claim.

Even if the solicitors breached the 'working together' agreement, I do not think this in itself is a reason for their opinion on the value of Mr W's claim to be disregarded. The 'working together' agreement is a separate contract between the solicitors and NFU. Mr W says it imposed obligations on the solicitors to keep Mr W up-to-date with the costs on his case and the indemnity left under his policy. These are reasonable requirements and solicitors are obliged by their own professional rules to keep client's informed about costs in any event. However, I make no finding about whether the terms of the agreement were breached, as I do not think I need to in order to fairly determine the outcome of this complaint.

I say this because even if the solicitors did not comply with the terms, that is a matter between NFU and the solicitors, or for their professional governing body. It does not in my opinion impact the solicitor's standing to advise on the value of Mr W's claim and I have not seen any other convincing expert evidence that would mean the solicitor's advice on the value on the claim cannot be relied on.

The solicitors had put forward an offer to settle of £13,000 in respect of damages on behalf of Mr W, prior to the counteroffer from the other side that led to the settlement agreement. I also note that the offer letter from the other party refers to a joint single expert having valued the items Mr W was claiming were damaged by the other party as being worth a little over £11,000. This therefore supports the position that £13,000 was not a reasonable settlement for Mr W's damages and I have seen no independent convincing evidence that Mr W's claim was worth more than this.

Mr W may have been hoping to obtain a higher settlement but just because he didn't achieve the amount he wanted, doesn't change the fact that the NFU is entitled to recoup some of its outlay.

NFU has relied on the solicitor's advice about the value of the claim and from an in-house counsel that supported its position. I think it has acted reasonably and is entitled to act on the advice of the solicitors that had conduct of Mr W's legal claim as to the appropriate apportionment between damages and costs. As the Investigator pointed out, there would be no reason for the solicitors to misrepresent the value of Mr W claim.

Mr W also says that NFU knew the wording of the settlement agreement meant he should receive the entire settlement payment, and that this is evidenced by the fact NFU asked, after seeing the settlement agreement, for confirmation of the basis of the settlement. I do not interpret this as meaning NFU 'knew' the total payment was for damages only. I think it was entirely reasonable for it to continue checking the opinion of the solicitors for confirmation of the position.

Mr W also says NFU told him it was the solicitors that were objecting to the release of the settlement to him, but that the solicitors told him they had no objection to releasing the full settlement if NFU agreed but then said NFU refused. Mr W says this shows dishonesty on NFU's part.

I can see that NFU said that it *was* for the solicitors to decide what to do with the undisputed £13,000 part of the settlement payment. And ultimately it is up to the solicitors what they did with the money, as they were acting for Mr W. I do not consider any of the discussions demonstrate any dishonesty or lack of good faith on NFU's part.

I can see a note of a phone conversation, which records that NFU said it would take solicitor's and counsel's advice on what would be a reasonable split. Mr W says it should therefore get independent counsel's advice as it said it would. However, I do not think it is obliged to do so and saying it would in a telephone call does not bind it to doing so either.

Mr W says the policy requires NFU to do this in the event of disagreement but I do not agree. The policy says that NFU may require the policyholder "*to get, at their own expense, an opinion form an expert…on the merits of the claim or proceedings, or on a legal principle*". I can see no part of the policy that requires NFU to pay for a further opinion in the circumstances we have here.

I see no reason why NFU should pay for any further advice when it is entitled to rely on the advice of the solicitor who had conduct of the matter. Given that advice, I think it is reasonable that £12,000 of the £25,000 settlement be apportioned to costs.

<u>Events in September, October and November 2023 and discussions between NFU and the solicitors</u>

Mr W says that the matter should have been immediately logged as a complaint by NFU in September 2023 and dealt with under its complaint process but instead it colluded with the solicitors behind his back about taking some of the settlement. Mr W says that if NFU had acted on the complaint as required by his policy, his legal action would have been saved and he would have been able to obtain an offer of settlement that reflected the proper value of his claim and NFU would have recovered all its costs.

As explained above, I have no jurisdiction to consider complaint-handling in itself but even if Mr W did raise a complaint that was not dealt with (which I make no finding about) I do not think NFU acted unreasonably in proceeding with consideration of the appropriate split of the

settlement. Mr W suggests there was collusion. I have seen no evidence of any untoward communications between NFU and the solicitors. NFU was entitled to liaise with the solicitors about whether the offer was reasonable and about recovery of some of its outlay. Mr W is also adamant that if NFU had taken different action in late 2023, he would have achieved a higher settlement. I have seen no convincing evidence to support this.

I can't see any persuasive evidence that NFU unduly influenced the solicitors or that, but for anything NFU did, a higher settlement would have been achieved. It's clear from the papers I've seen that NFU relied on the solicitor's advice and no persuasive evidence (other than Mr W's assertions) has been provided to support that this advice was incorrect.

Mr W also says he signed the settlement agreement on the understanding he would receive the entire £25,000 and if he'd known he wouldn't keep all of it, he would not have signed it.

I have also seen a note of a telephone call between NFU and Mr W on 18 September 2023, which records that he said he was keen to accept the offer before it was withdrawn. I also note that Mr W was aware at that stage it was a global offer and the solicitors had recommended the settlement be apportioned as being £13,000 for damages and £12,000 towards his costs. Mr W was copied into some of the email correspondence and the solicitors confirmed they had advised Mr W of their opinion that he should receive £13,000 for damages. Mr W may have been hoping to get more than £13,000 in the end but he was aware that the solicitors valued his claim at £13,000 and NFU were therefore claiming £12,000 towards its outlay on costs. He didn't agree to this but he was aware then that this was the position of NFU and the solicitors.

I am also satisfied that Mr W was aware that he would likely not receive the entire payment when he signed the settlement agreement. Therefore, I am not persuaded that Mr W only signed the agreement because he thought the agreement was that he would get £25,000 rather than a figure closer to £13,000.

Given all of the above, I consider that NFU is entitled to receipt of the £12,000 being held by the solicitors.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 2 April 2025.

Harriet McCarthy
Ombudsman