

The complaint

Mr K complains on behalf of the Estate of Mrs K that the National Farmers' Union Mutual Insurance Society Limited (NFU) won't pay him the difference between the costs he incurred in legal action and what his advisors charged him. Mr K believes NFU should pay him around £10,000.

Where I refer to NFU, this includes their agents and claims handlers.
For ease of reading, I'll mostly only refer to Mr K where I mean the Estate of Mrs K.

What happened

The detailed and lengthy background to this complaint is well known to both parties. So, I'll only provide a summary of some key events here. Mr K made a claim on a legal expenses policy with NFU to cover two related legal disputes – to defend planning enforcement action brought by the local council – and to take legal action against the council for maladministration and misfeasance.

Whilst the claims were initially both accepted, cover was later withdrawn by NFU for the maladministration and misfeasance. Mr K has previously complained to our service about the cover being withdrawn and about delays in arranging for payment of the costs that were covered up until a complaint response NFU had issued in July 2017. That matter was considered by an ombudsman at our service who concluded it wasn't a complaint we could consider as it was outside of our jurisdiction. A decision to this effect was issued in May 2019.

But cover had remained in place for defending the enforcement action from the council and this concluded successfully for Mr K when the enforcement notice was quashed. In June 2017 The Planning Inspectorate ordered that the council pay Mr K his costs of the appeal proceedings.

Ultimately Mr K accepted around £55,000 from the council towards his costs. But this still left him with a shortfall. Mr K complained again to NFU and asked them to make up the difference. NFU declined to do so, in summary they explained that costs are considered on a standard basis. As this was how the costs had been assessed against the council, they wouldn't be able to contribute towards the shortfall as the policy only provides cover for costs on the same standard basis.

The complaint was referred to our service. One of our investigators didn't think it should be upheld. Overall, he thought that NFU had acted fairly. Mr K says that our investigator had considered more issues than what his actual complaint was. He made clear that he was solely complaining about NFU not reimbursing him the shortfall and nothing further. He doesn't wish our service to comment on the conduct / behaviour of NFU, just whether they ought to make up the shortfall. He also highlighted some case law which he says supports his position. Mr K asked that an ombudsman review his complaint.

In June 2021 I issued a provisional decision in which I said:

“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 thank Mr K for providing clarity in response to our investigator as to the specifics of his complaint. He’s asked that I make a finding as to whether NFU owe him further money in lieu of the costs he incurred. It isn’t my role to make a finding as to whether money is legally owed by one party to another. But I can consider whether NFU have acted fairly and reasonably in all the circumstances when declining to pay anything further towards Mr K’s costs.

The relevant part of the NFU policy says “We will pay the costs and expenses incurred by a representative...” Those legal costs are given a specific definition within the policy of “All reasonable and necessary costs chargeable by the representative on a standard basis...” Terms like this are very common to this type of insurance. Only reasonable and necessary costs are provided for in the work undertaken by a representative on behalf of the insured. I don’t think it’s unfair that costs that don’t meet that threshold aren’t covered.

In this case, had Mr K not been awarded his costs, these would have been met by NFU and in line with the above policy term only reasonable and necessary costs are covered. It’s likely NFU would have engaged a costs draftsman to assess the costs in that regard. But in this case, an award of costs against the other side was made. A costs lawyer was appointed to help negotiate the settlement of the same.

The costs lawyer involved concluded that the offer from the council was “at the higher end of the typical range.” They also said: “Detailed assessments are notoriously difficult to predict. The most common range is between 60-80% of the costs incurred, so in this case that would equate to £41,995.50 - £55,994. The offer is a substantial increase upon the previous offer of £37,500.”

I think it is fair for NFU to rely on the costs lawyer’s opinion that the offer from the other side ought to be accepted and that it was towards the higher end of the typical range. But a negotiation to settle costs isn’t the same thing as an assessment of whether or not those costs were ‘reasonable and necessary’. In any negotiation of this nature it’s highly likely that there will always be an element of compromise. The costs lawyer themselves acknowledged this when saying “Sadly it is commonly the case that costs cannot be recovered in full. Whilst the costs may be reasonable as between you and the solicitor, it does not necessarily follow that they are all payable by [the council].”

I accept it’s likely that there is going to be a lot of ‘common ground’ between what was negotiated in settlement from the other side and what was ‘reasonable and necessary’ (in line with the policy terms). But usually I’d expect an insurer to make an assessment of what they should pay under the terms of the policy, and then to deduct from that amount whatever was recovered from the other party involved in the legal dispute.

I don’t think it is reasonable for NFU to rely on what the costs lawyer has said to conclude that the shortfall between what was incurred and what the other side paid – was made up of costs that weren’t reasonable or necessary. And in the absence of a further assessment of those costs, I think more needs to be done. But it doesn’t automatically follow that all of the shortfall will be paid.

Mr K believes NFU should meet the full shortfall and has made reference to Woodford v AIG [2018] EWHC 358 in which the Court found that “an insured is entitled, contractually, to recover costs reasonably incurred in full irrespective of how a Court might approach an

assessment of those costs (the latter being a discretionary process, the former being a contractual entitlement).”

My role requires that I make my decision on what I believe to be fair and reasonable in all the circumstances. So whilst the law is a relevant consideration, our service doesn't automatically approach a complaint in the same way that a court might. That being said, I've read the judgement that Mr K has referenced and have taken it into consideration but there are some notable differences between that case and the situation here and I remain of the opinion that my proposed resolution to this complaint is fair. Mr K's policy doesn't provide an indemnity against losses it provides for the reasonable and necessary costs of a legal defence where such a situation is an insured incident under the policy. The policy is clear that only reasonable and necessary costs are covered and that any claim will be assessed on a standard basis. So that's the contractual basis on which Mr K may claim his costs. In summary, I don't think that NFU have done enough to evidence that the shortfall doesn't include reasonably and necessarily incurred costs.

For the reasons outlined above, but subject to any further information I receive from either Mr K on behalf of the Estate of Mrs K or from NFU, I'm intending to uphold this complaint in part.

I intend to direct National Farmers' Union Mutual Insurance Society Limited:

- To appoint a costs draftsman to make a detailed assessment of the costs to evidence that they were reasonable and necessary.*
- if the reasonable and necessary costs are greater than the amount recovered from the other party, the difference should be paid to the Estate of Mrs K. 8% simple interest yearly should also be added to that amount. This should be calculated between the date the offer from the other side was accepted and the date of settlement.”*

Mr K and NFU provided responses which I'll address below. Now both sides have had an opportunity to comment, I can go ahead with my 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.

NFU said that they had concerns there could be far reaching implications to my intended outcome. In summary they said the costs lawyer's assessment would have involved an assessment of costs on a standard basis. And if the offer from the other side didn't represent that, they had the option to allow it to progress to a Provisional Assessment (which they didn't recommend). They point out that the offer was described as being at the 'upper end' of a standard basis recovery. They also believe that another assessment is likely to produce a very similar if not lower amount compared to the offer that was accepted. NFU also said that some of my quotes from the costs lawyer were out of context as they were intended to help explain the difference between a standard and an indemnity basis.

I've considered this and I understand NFU's position. But I maintain that there is a material difference between a negotiation as to costs between parties on a standard basis as directed by a court and what costs actually were reasonable and necessary in line with the policy terms. By its very nature a negotiation is, in my opinion, more likely to result in a compromise whereas reasonable and necessary costs on a standard basis are objectively what the policy provides for. I acknowledged in my provisional decision it is highly likely that

there will be a large degree of overlap between the offer and what a further assessment might find to be reasonable and necessary costs.

But as things stand, I don't think NFU have enough evidence that some of the shortfall between the offer and the total costs incurred isn't made up of reasonable and necessary costs. If the assessment finds the costs to be a lower amount, then nothing further will be payable.

Mr K requested that any costs draftsman not be linked to NFU or their claims handler. He is of the opinion that their impartiality can't be assumed. He also believes that a detailed assessment will require his involvement and has asked me to consider directing that NFU indemnify him for legal representation in the process. I've considered this but I'm not persuaded that either NFU can't use their own costs draftsman nor that they need to further indemnify Mr K in the way he's requested.

It is common industry practice that at the conclusion of a claim, costs are assessed by a costs draftsman. It's similarly common that this assessment is done by an insurer's claims handler. And whilst I can understand Mr K's point, I'm not persuaded there is evidence to support that NFU's in house team would be biased against him. It's also likely that Mr K won't be required to have significant involvement in the process, but where his input is required, I'm not persuaded that NFU need to meet his costs of providing further information if requested or for the time of a representative should he choose to use one.

Overall, I'm not persuaded to deviate from the outcome explained in my provisional decision.

My final decision

My final decision is that I uphold this complaint in part. The National Farmers' Union Mutual Insurance Society Limited must:

- appoint a costs draftsman to make a detailed assessment of the costs to evidence that they were reasonable and necessary. (For clarity this can be done in house with NFU's claims handler);
- if the reasonable and necessary costs are greater than the amount recovered from the other party, the difference should be paid to the Estate of Mrs K. 8% simple interest yearly should also be added to that amount. This should be calculated between the date the offer from the other side was accepted and the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K on behalf of the Estate of Mrs K to accept or reject my decision before 12 August 2021.

Richard Annandale
Ombudsman