DRN-4632530

## The complaint

Mrs C's complaint is about the handling of a claim under her legal expenses insurance cover with Royal & Sun Alliance Insurance Limited ("RSA").

RSA is the underwriter of this policy, *i.e.* the insurer. Part of this complaint concerns the actions of the agents it uses to deal with claims on its behalf. As RSA has accepted it is accountable for the actions of the agent, in my decision, any reference to RSA includes the actions of the agents.

## What happened

In March 2023, Mrs C contacted RSA as she wanted to make a legal claim against a contractor in relation to work on her property.

RSA agreed to consider the claim and appointed one of its panel of solicitors to assess the claim. The panel solicitors wrote to Mrs C and asked her to sign their "engagement letter" which set out their terms of appointment.

Mrs C was very unhappy about this, as she says the letter emphasises that she would be personally responsible for her costs, as well as those of her opponent, if she was ordered to pay them by the court, should there be any breaches of the policy conditions. Mrs C says the letter is written in a way that made her worry RSA would find a breach in order to leave her liable. Mrs C raised her concerns with RSA but says she was not reassured that this was unlikely and in fact feels it is a tactic to deter policyholders making claims out of fear over becoming liable for fees.

Mrs C also says that a representative of RSA abruptly ended a call with her when she was discussing this matter; and the panel solicitors closed her file because she had not signed the engagement letter, which she says shows they were "disengaged" and unlikely to represent her best interests. Mrs C says she doesn't feel she can safely sign this agreement and wants her own chosen solicitor to act for her.

RSA says the policy does not allow a policyholder to use their own solicitor until the point that legal proceedings need to be issued, or if there is a conflict of interest, neither of which is the case here. RSA also says that while it covers the legal costs, subject to the terms of the policy, it is not the solicitor's client. It says Mrs C is the client and is therefore primarily liable for the solicitor's fees but that it is indemnifying her for those fees. RSA said she would only be liable for the fees if the funding authorised under the policy was exceeded or she had not complied with the terms of the policy, for instance if she did not take the advice of the solicitor and acted outside of their recommendation.

RSA also says that Mrs C would have to sign a similar letter of engagement whether she used a panel solicitor or your own chosen solicitor prior to them acting for her, which would state the same thing – that she is liable for the costs incurred if she acted outside of the terms and conditions of the policy.

RSA apologised for a phone call with its agent being cut off and said the representative should have called Mrs C back but as she had already said she would be contacting RSA for further clarity, there was no reason for the agent to call back, as there was nothing further he could add.

RSA says the claim has been handled in accordance with the terms and conditions of the policy and it has not done anything wrong.

One of our Investigator's looked into the matter. She did not recommend that Mrs C's complaint be upheld, as she was satisfied the policy did not entitle the policyholder to choose a solicitor before court proceedings were needed, unless there was a conflict of interest. The Investigator also said it was reasonable to expect Mrs C to sign an engagement letter with the solicitors, as they are independent of RSA and they would not otherwise be able to act for Mrs C.

Mrs C does not accept the Investigator's assessment. She made a number of points in her initial complaint and in response to the Investigator. I have considered everything Mrs C has said but have summarised the main points below:

- The Investigator did not answer all her points and did not reach a fair, reasonable or legal conclusion.
- The Investigator ignored the Insurance Companies (Legal Expenses Insurance) Regulations 1990, which should be implemented fully. By not doing so, the Investigator has betrayed the public and Parliament.
- The Regulations say she is entitled to choose her own solicitors from the start of an inquiry, not just when proceedings are likely.
- RSA has deceived her in saying she is not entitled to her own choice of solicitors.
- Any reference to EU case law or any other interpretation of the Regulations is immaterial – *"the law is the law"*.
- Since The Insurance Companies (Legal Expenses Insurance) Regulations 1990 came into force in the UK, every insurance company who sought to restrict their policyholders right to choose their own solicitor from the start of the inquiry - by including a clause in the contract insisting they only use panel solicitors - has been in breach of the Regulations, and therefore acted illegally.
- This restrictive clause in her policy should be treated as invalid, as it does not comply with the Regulations.
- The panel solicitors are employed primarily by RSA, so their loyalty will be to them.
- RSA uses an online portal, which she found difficult to use. And as the solicitors closed her file, she no longer had access to it and the previous documents and correspondence.
- When she called RSA about this, the representative initially was sympathetic but then abruptly told her she'd need to sign the terms otherwise the solicitors could not act for her. The call was then cut off. She thinks the call was being listened to and was cut off because RSA did not want her concerns recorded. If the call had accidentally been cut off, the representative would have called her back but he didn't.
- The rate quoted in the terms of appointment are enough to instruct her own chosen solicitor. So why does she have to use only this one panel solicitor and not a solicitor of my choice?
- To make the customer legally liable for legal expenses, where an insurance policy is already in place is unreasonable.

As the Investigator was unable to resolve the complaint, it was passed to me. I issued a provisional decision on this matter in January 2024, in which I made the following findings:

"Freedom of choice

The Insurance Companies (Legal Expenses Insurance) Regulations 1990 are derived from the European Council Directive 87/344/EEC of 22 June 1987, recast by the Directive 2009/138/EC into the Insolvency II Directive.

Article 3 of the Directive 87/344 made it clear that the only circumstances in which a policyholder would have the right to choose their own legal representative at the start of an insurance claim would be if the insurer had not given undertakings to separate legal expenses from its other classes of business.

In that instance, the Directive says: *"the insured persons may instruct a lawyer of their choice or, to the extent that national law so permits, any other appropriately qualified person, from the moment that those insured persons have a claim under that contract."* (My emphasis.)

However, all UK legal expenses insurers opted to undertake to separate legal expenses cover from all its other classes of business (which is why RSA uses claims-handling agents to deal with legal expenses insurance claims). As RSA opted to do this, the EU Directive says that a policyholder's freedom to choose is triggered when it is necessary for them to be represented in any *"inquiry or proceedings".*

The provisions of the Directive were transposed into UK law by way of the 1990 Regulations … and the relevant part of the Regulations say:

> *"(1) Where under a legal expenses insurance contract recourse is had to a lawyer (or other person having such qualifications as may be necessary) to defend, represent or serve the interests of the insured in any inquiry or proceedings, the insured shall be free to choose that lawyer (or other person).*
> […]
> *(3) The above rights shall be expressly recognised in the policy."*

Mrs C says that the inclusion of the word *"inquiry"* means she is entitled to freedom of choice over her legal representatives under the policy from the start. I do not agree and will explain why.

The meaning of the term *"inquiry or proceedings"* has been considered in a number of European Court of Justice cases. None of these cases have given cause for us to change our approach which is that *"proceedings"* is reasonably interpreted as meaning judicial proceedings, to include tribunals as well as courts; and "inquiry" is reasonably considered to be something akin to an administrative procedure which might take place before a court or another body.

I do not consider that *"inquiry"* can reasonably be interpreted as simply being a stage that takes place before the *"proceedings"*. I consider it would require an action of some sort to have been commenced, or be imminent, and does not cover pre-action work or advice.

Otherwise, if it was intended that freedom of choice should be granted for all pre-action and preparatory stages under the EU Directive quoted above, there would have been no purpose in the Directive giving another alternative to insurers that don't undertake to separate out their legal expenses insurance business, *i.e.* giving the insured person freedom of choice *"from the moment that those insured persons have a claim under"* the insurance contract.

Mrs C's policy reflects the provisions of the 1990 Regulations and clearly entitles RSA to appoint its own representative at an earlier stage (in the absence of a conflict of interests which does not seem to apply here):

> *"Choosing a representative*
>
> *In the period before Court papers need to be issued (or have been received) we may refer your case to a suitably qualified representative to act on your behalf.*
>
> *At the point where Court papers need to be issued (or have been received), or where there is a conflict of interest, you are free to choose a suitably qualified representative."*

I am therefore satisfied that the policy terms and conditions comply with the requirements of the 1990 Regulations. Accordingly, I am satisfied that there is nothing inherently unfair or unreasonable in RSA wanting to appoint panel solicitors at this preliminary stage.

Under my terms of reference, I can look beyond the law and strict policy terms to decide what I think is fair and reasonable in the circumstances. But in a case such as this, where the policy gives the right of choice to the insurer, the circumstances would have to be exceptional to justify overriding the policy terms, and allowing the policyholder freedom of choice from the very outset.

However, there is no evidence as far as I'm aware that it would have been reasonable for RSA to have offered Mrs C this right due to any exceptional circumstances about her case, such as any legal complexity or a conflict of interest, for example. Disagreeing with the opinion of a panel solicitor for instance, is not a conflict of interest. That concept covers true conflicts where the representatives might be regarded as 'professionally embarrassed', e.g. because they previously acted for the assured's opponent or because they have a vested interest in the subject-matter of the legal dispute, etc. There is no evidence that this is the case here.

Requirement to sign terms of engagement with panel solicitors

Most legal expenses insurers have a panel of preferred solicitors which they have pre-authorised and with which they have agreed terms of appointment, including normally a rate of remuneration less than the market rate. This has a number of advantages in that they are used to working with the insurer and the rates are lower, therefore the limit of indemnity may not be used up as quickly. There is nothing inherently unfair about such arrangements.

Mrs C is concerned that the relationship between the panel solicitors and RSA means their loyalty would not be to her. However, the solicitors are independent professionals subject to regulation by their own professional body. And any solicitor's primary duty is to the courts and then their client. This is the case whether the solicitor is on the insurer's panel of preferred solicitors or not. We expect legal expenses insurers to take care to appoint solicitors that are suitably qualified and experienced to deal with the legal case in question, however, once they are appointed, the insurer has no right to interfere with how the legal claim is run; it is only responsible for indemnifying their fees, subject to the terms of the policy. The policy is one of indemnity. So the solicitors will be acting for Mrs C and the primary responsibility for the costs would be hers, which is why she is being asked to sign the engagement letter, but RSA agrees to cover the reasonable and necessary

legal costs incurred.

As stated, as the solicitors will be acting for Mrs C, it is not unreasonable that they require her to enter an agreement with them about the terms under which they will act. The fact they are panel solicitors doesn't change this.

In practice, RSA will pay the solicitor direct and one of the benefits of using a panel solicitor is that there are pre-agreed protocols and requirements for the solicitors to seek authority from the insurer before taking any significant steps.

I also think that RSA has done what it can to reassure Mrs C about this. When Mrs C raised concern about the arrangements, RSA wrote to her and said:

> *"provided the terms and conditions of your policy are observed, subject to the funding authorised under your policy not being exceeded there is no reason why you would have to pay anything to … [the panel solicitors]…Prior to any action being taken the lawyer is required to request funding and advise as to what this is for.*
>
> *Providing that the terms and conditions are satisfied then funding will be authorised, and you will not be liable for this. An insured would be liable for the costs that had been agreed and incurred if for example, you did not take the advice of the lawyer and acted outside of their recommendation."*

I also note the panel solicitor's letter enclosing the engagement letter said:

> *"Funding your claim*
> *You have the benefit of a legal expenses insurance policy for legal costs. You are primarily responsible for payment of fees we incur and the costs of the opponent if you are ordered to pay them. However your legal expenses insurer will pay these up to the policy's indemnity limit providing the terms of the policy are met."*

So while I can understand that Mrs C is anxious not to end up with a bill for legal costs, I do not consider that RSA has acted unreasonably in appointing panel solicitors, or that it is unreasonable for the solicitors to require her to sign the engagement letter before acting for her under the policy. Mrs C has expressed distrust of the panel solicitors and RSA but I do not think it can do anymore to reassure her.

Other matters

Mrs C also complained that a call with RSA's agent got cut off and says this was deliberate, so the details of her complaint were not recorded. I have seen nothing to support what Mrs C has said about this. The representative was trying to assist Mrs C from what I can see. RSA has apologised that the call was cut off and that the agent did not call her back but he apparently did not think there was anything more to add. I agree the agent should have called Mrs C back but think the apology is sufficient and do not require RSA to do anything more about this.

Mrs C has also complained that the solicitor closed her file when she did not say she didn't want to proceed. The solicitor did close the file, as Mrs C had not agreed their terms but their letter stated clearly that this was an administrative step only and the file could be reopened if she wanted to proceed. If Mrs C wants to proceed and signs the terms of engagement, the file should be reopened.

> Mrs C also said that the online portal is difficult to use and that she no longer has access to communications stored on it, as the claim was closed. She can ask RSA for copies of anything she wants and I would also expect it to assist if there are any difficulties in progressing her claim using the portal."

Having considered everything, I provisionally decided not to uphold the complaint. I invited both parties to respond to my provisional decision with any further information or evidence they want considered.

**RSA's response to my provisional decision**

RSA has responded to my provisional decision and confirmed it has nothing further to add.

**Mrs C's response to my provisional decision**

Mrs C does not accept my provisional decision. She has referred to a number of court cases that she says support her complaint. I have listed the cases she had referred to and summarised Mrs C's comments about each one:

> *1. Brown-Quinn (2) Webster Dixon LLP and Others v (1) Equity Syndicate Management*
> *Ltd (2) Motorplus Ltd [2012] EWCA Civ 1633.*
>
> Mrs C says this case supports her submission that she has the right to choose her own solicitor from the start of this legal inquiry. She says the Court reminded legal expenses insurers of their obligations under the Insurance Companies (Legal Expenses Insurance) Regulations 1990 and criticised the insurer in that case for failure to comply with the Regulations. The Court said that clauses where an insurer seeks to inhibit the policyholder's freedom to choose a lawyer, will be struck down for want of compliance with the Regulations.
>
> In addition, it was determined that in general, non-panel solicitors can only expect to be paid the same rate as panel solicitors and any difference should be paid by the insured. Mrs C says she is willing to pay the difference in the panel solicitor's rates and those of her chosen solicitor.
>
> *2. Sarwar v Alam [2001] EWCA* the Court in *Brown-Quinn* said that a *"warning shot"* had been given to insurers in the judgment of this case about policies which do not comply with the Regulations.
>
> *3. Eschig v UNIQA Sachversicherung AG (2009) C-199/08*
>
> Mrs C says this was interpreted by the Financial Services Authority ("FSA", which was the financial services regulator at the time) to signal that a policyholder's freedom of choice arose before the commencement of any inquiry or proceedings.
>
> In a letter written to all legal expenses insurers the FSA made clear that any provisions in a legal expenses policy which detract from, or qualify in any way, the freedom of a policyholder to retain a lawyer of their own choice, will be unlawful.
>
> Mrs C also referred to the following extract from the Financial Conduct Authority ("FCA") website: *"The ECJ ruling clarified that when recourse is had to a lawyer in any inquiry or proceedings, or whenever there is a conflict of interest, then freedom to choose a lawyer is guaranteed, and so any provisions of a contract that detract*

*from, or qualify in any way, that freedom to choose a lawyer, would not comply with the Council Directive 87/344/EEC of 22 June 1987 on Legal Expenses Insurance (Directive) (transposed into UK law by the Insurance Companies (Legal Expenses Insurance) Regulations 1990 (Regulations).*

*Removing …[a previous undertaking from a legal expenses insurer] from our website does not detract from our requirement that all firms should have fair terms in their standard contracts with consumers. We have sent a letter to firms reminding them of the requirement to comply with the Directive and Regulations."*

*4. Stark v DAS Osterreichische Allgemaeine Rechtsschutzversicherung AG (2011) C-293/10.*

Mrs C says that the European Court of Justice decided that that restrictions on freedom of choice that rendered that freedom meaningless were not permissible.

**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 have considered all the evidence provided again, together with Mrs C's response to my provisional decision including the Court cases to which she has referred.

I do not agree with Mrs C that the Court cases (or any others of which I am aware in which the court has been asked to consider issues relevant to this complaint) provide any authority that her freedom of choice under her policy with RSA should be triggered before proceedings are required, except if there were a conflict of interest between her and the panel solicitors offered.

The Court of Appeal in *Sarwar v Alam* noted that there was some concern about the "possible inappropriateness" of denying policyholders freedom of choice before proceedings are actually issued. However, it did not give a clear authority that freedom of choice should be given before any inquiry or proceedings were required.

Mrs C is correct that in the *Brown-Quinn* case there was some criticism of legal expenses insurers who were seeking to restrict an insured's freedom of choice. However, that was where the insurer had imposed policy terms that sought to limit their insured's freedom to choose their own representative after that freedom had already been triggered. The Court said *"that the insured's freedom to have the lawyer of his choice is to be expressly stated in the contract made with the insured."* The court did not decide that the freedom of choice would be triggered from the start of the insurance claim.

The European Court of Justice's decision in the case of *Eschig* was that the policyholder's right to freedom of choice could not be circumvented by insurers just because the policyholder was involved in a class action (i.e. where a number of different claimants were taking the same issue to court). It did not go any further than this and again I do not consider that it changes the right of insurers to limit a policyholder's freedom of choice to the start of proceedings or in cases of conflict of interest.

The FSA did publish a letter on 19 July 2010, following the *Eschig* judgement, reminding insurers of their obligations in relation to legal expenses insurance. This letter was revised on 12 August 2010 by the addition of two footnotes. The first footnote explains that the *Eschig* case that the freedom to choose under the European Directive is guaranteed but can be restricted in certain cases. The second footnote explained that the right of the insured to

choose a lawyer under UK Regulations occurs when negotiations have failed and legal proceedings are necessary. Mrs C's policy terms are in line with this.

In the *Stark* case the legal expenses insurer sought to restrict the insured's freedom to choose their own solicitor (which had been triggered) on the basis the solicitor was out of the local jurisdiction. Again, the Court did not make any finding that would mean that UK legal expenses insurers cannot restrict freedom of choice to the point that proceedings are necessary.
As set out in my provisional decision, the EU Directives make it clear that the only circumstances in which a policyholder would have the right to choose their own legal representative at the start of an insurance claim would be if the insurer had *not* given undertakings to separate legal expenses from its other classes of business. As RSA has separated out its legal expenses business from its other classes of business, the EU Directive says that a policyholder's freedom to choose is triggered when it is necessary for them to be represented in any *"inquiry or proceedings"*.

Therefore, having considered everything provided to me again, I remain of the opinion that Mrs C's policy terms comply with the requirements of the 1990 Regulations and – in the absence of any exceptional circumstance or conflict of interest - RSA is entitled to appoint panel solicitors at this preliminary stage of her claim. Mrs C's freedom to choose her own solicitors will arise once proceedings are required.

Neither Mrs C nor RSA have provided any further comments about the other issues addressed in my provisional decision. I therefore see no reason to change those findings and I remain of the opinion that it is not unfair or unreasonable for the panel solicitors and RSA to expect Mrs C to sign terms of appointment with the panel solicitors. As stated in my provisional decision, I do not think RSA can do anymore to reassure her about this.

**My final decision**

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 26 March 2024.

Harriet McCarthy
**Ombudsman**