

## **complaint**

Mr S complains about Bar Mutual Indemnity Fund Limited's decision to withdraw funding for his claim.

## **background**

I issued a provisional decision on this complaint in December 2015. An extract of the provisional decision follows:

*Mr S has professional indemnity insurance underwritten by Bar Mutual.*

*Proceedings were issued against Mr S. As a result, Mr S asked Bar Mutual to cover his legal defence costs. Bar Mutual agreed and panel solicitors were appointed to represent him.*

*During a meeting in April 2014, Mr S's barrister advised on a defence to be prepared for trial. Mr S said it was agreed that his barrister would draft a skeleton argument setting out the defence.*

*Later, the panel solicitors told the barrister not to draft the skeleton argument. They said they weren't prepared to run this particular defence, as Bar Mutual wasn't prepared to fund it.*

*Bar Mutual explained that whether the defence would succeed or fail could be established by disclosure from a third party later on. So, it didn't want to incur costs running the defence at this point.*

*Mr S was unhappy with this decision, so he stopped instructing the panel solicitors. He asked Bar Mutual to fund the costs of a solicitor of his choice. Bar Mutual offered to appoint another panel firm but Mr S rejected this offer. He wanted to appoint a particular firm, which wasn't on Bar Mutual's panel.*

*Because of this, Bar Mutual withdrew funding for Mr S's claim. It said the claim wasn't covered under the terms of the policy. It had exercised its discretion in covering the claim up until that point, but was no longer prepared to do so.*

*Mr S was unhappy with this. He said that in practice, Bar Mutual does provide cover for this type of proceedings, and that he had a right to appoint a solicitor of his choice.*

*After Bar Mutual withdrew funding, Mr S instructed his barrister on a direct access basis. He successfully defended the claim made against him.*

*He complained to our service about Bar Mutual's decision to withdraw funding, which he said was irrational. He has incurred legal costs, which he considers Bar Mutual should cover.*

*The adjudicator upheld the complaint. She said Bar Mutual hadn't acted reasonably in withdrawing all cover when Mr S asked for an off-panel firm to be appointed.*

*Bar Mutual appealed. It said:*

- *It was always prepared to fund the claim but only on the previously agreed terms.*
- *It offered Mr S a choice of a number of different panel firms.*
- *It made it clear that if an off-panel solicitor was appointed, funding would cease.*

- *The barrister and solicitors were instructed on a joint retainer. Both Bar Mutual and Mr S were clients. Bar Mutual wasn't prepared to fund the technical defence. The panel firm couldn't act unless it received instructions from both clients.*
- *It wanted to delay incurring funding for the technical defence until key information had been received from a third party. It would have been received within a few days and there was no prejudice to Mr S's case in waiting for it to be provided.*
- *The tribunal ruling, which was in Mr S's favour, didn't mention this particular defence.*
- *Appointing another firm of solicitors would not have changed Bar Mutual's view and the joint retainer meant that no other appointed panel firm could work on this defence.*
- *As a not-for-profit mutual organisation, it is required to act in the interests of its members as a whole. It considers carefully whether it would be appropriate to extend cover and if so what limitations should be attached.*
- *The original decision was made because they thought this legal dispute was connected to other proceedings covered by Bar Mutual under insurance indemnity. The connection was that the regulator was intending on driving Mr S out of practice. By the time Mr S asked for a change of solicitors it was clear that this wasn't the case.*
- *Bar Mutual had the right to appoint panel solicitors even if cover had been provided under an insurance indemnity.*
- *Mr S should have informed Bar Mutual at the outset if he didn't want to appoint the panel solicitors.*
- *The panel firm would have been in breach of their own professional obligations if they had acted on Mr S's instruction alone.*
- *For legitimate commercial and quality-control purposes it wanted a panel solicitor appointed.*
- *None of the fee earners Mr S wished to instruct had experience of the relevant disciplinary process.*
- *15 panel firms were available.*

*Mr S's representative also made further comments. He has said that:*

- *The whole point of the meeting was to agree a strategy. He led the discussion and agreement was reached – not 'in principle'; it was agreed without any conditions.*
- *Bar Mutual didn't specify a timescale for how long it wanted to delay the defence. The delay could have been indefinite.*
- *The third party never did reply with the information in question. So, waiting for this was likely to cause substantial further delay at a vital time.*
- *Jeopardising Mr S's chances by refusing to fund preparation for his case at such a critical time couldn't possibly be the best course of action.*
- *The defence worked as part of an overall strategy.*
- *Mr S incurred costs submitting a complaint to our service. Bar Mutual should also pay these costs.*
- *Bar Mutual's actions also caused a great deal of distress for Mr S at a time when he was already particularly vulnerable, and he should be compensated for this distress.*

*As a result the matter has been passed to me to determine.*

### **my provisional findings**

*In my judgment the issue comes down to this – whether the stance that Bar Mutual took in April 2014 was fair and reasonable, in view of the circumstances at the time.*

*There's some disagreement about precisely what happened at the meeting on 1 April, involving Mr S, his barrister, the panel solicitors and a representative from Bar Mutual. Mr S's barrister says they discussed preparations for the trial and agreed on how he was to prepare the case for that hearing. Bar Mutual say there was an agreement 'in principle', but this was to be confirmed once further information had been obtained.*

*The panel solicitors requested information from the third party on 3 April. On 8 April, Mr S complained about the delay. He said his defence was being held up, and the delay was compromising his position. He also pointed out that he was under great strain and needed to progress. Bar Mutual replied that it expected the information to be received within five working days, and it would then review matters.*

*Bearing in mind that a week had already passed since the meeting, and he was told it might be another week before the information was to hand, I can understand why Mr S didn't want to continue waiting. The trial was approaching. He was clearly under a lot of stress, since the outcome of the trial could have had very serious consequences for his professional career.*

*Bar Mutual says the delay was only a few days, and wouldn't have prejudiced Mr S's position. As I've said, a week had already passed, and he was told it might be another week before the information was received. There doesn't seem to have been a set timescale, nor any indication of what would happen if the information didn't arrive within another week.*

*Even if Bar Mutual felt the agreement reached at the meeting had only been 'in principle', Mr S's view was that steps needed to be taken to prepare his case. The barrister acting for him had given advice on how his defence should be dealt with. I think he would have expected that advice to be acted on within a reasonable time, and the prospect of delay at an important time in his case clearly caused him some distress.*

*Bar Mutual's argument that Mr S should have objected to the panel solicitors being instructed at the outset doesn't reflect the fact that circumstances had changed. He hadn't been opposed to them acting previously, but was now in a situation where he felt they were acting contrary to the barrister's advice and his own interests.*

*Bar Mutual denies that it withdrew cover, saying it would have agreed to another panel solicitor acting. The firm of solicitors Mr S suggested is a well-known and respected firm. As these solicitors offered to do that work at the same cost as panel solicitors, I can't see there was any real prejudice to Bar Mutual agreeing to this firm being instructed. Mr S then asked if he could instruct his barrister on a direct access basis. As the barrister was already familiar with the case, it would make sense for Mr S to wish him to continue acting. Again I can't see this would have caused prejudice to Bar Mutual.*

*I appreciate that Bar Mutual told Mr S he could have cover. But that was only on condition that he accepted another panel solicitor. He has explained his concern that this would have left him in exactly the same position, with a panel solicitor and Bar Mutual agreeing to take no further action pending receipt of the further information, without a set timescale. He was very close to trial and didn't feel he had time to wait for that. Bar Mutual's approach did effectively leave him without cover.*

*Bar Mutual did have discretion about whether to fund Mr S's case and, if so, on what basis. It could impose conditions. And I acknowledge that Bar Mutual also has a duty to other members as to how its funds are spent. But where an insurer is exercising discretion, I'd*

*expect that discretion to be exercised reasonably, and any conditions should themselves be reasonable.*

*I don't think Bar Mutual took sufficient account of the position Mr S was in, the reasons why he requested another firm of solicitors, and the importance to him of proceeding without further delay. It was effectively saying it would never agree to non-panel solicitors, regardless of his circumstances. Such a rigid insistence on only using panel solicitors unduly restricted its discretion, and wasn't fair or reasonable in these circumstances.*

*Mr S's barrister assisted him in bringing his complaint to this service and I've been asked to direct that Bar Mutual reimburse the costs relating to this. We don't consider it necessary for someone to be represented in order to bring their complaint to us. We offer a free and informal alternative to the courts; we're able to look at all the facts and reach a decision. So I don't think Bar Mutual should repay any costs Mr S has incurred in pursuing his complaint to this service.*

*But as I've explained, I do think Bar Mutual's approach caused Mr S some distress. He was already under strain, having to deal with the proceedings against him, and was suffering ill health. Of course, Bar Mutual wasn't responsible for all of that, but it was aware of the situation Mr S was in. Its decision caused unnecessary distress at a time when he was already vulnerable. I consider a payment of £750 would be reasonable to reflect this.*

### **my provisional decision**

*For the reasons given, I intend to uphold the complaint and award some compensation to Mr S. Bar Mutual Indemnity Fund Limited should:*

- *indemnify Mr S for the reasonable legal costs he incurred defending the disciplinary proceedings brought against him. Interest should be added to the settlement at the rate of 8% a year simple from the date Mr S paid these costs up to the date of reimbursement; and*
- *pay Mr S £750 for the distress and inconvenience caused to him.*

### **developments**

Mr S has broadly accepted my findings, but has raised some further points, including:

- It can't be right that Bar Mutual can instruct its own lawyers in spite of customer choice. The choice of lawyer must be a "reasonable" one. There's an implied term in the insurance contract that the discretion to appoint a lawyer will be exercised reasonably.
- Mr S's choice of solicitors to replace the panel solicitors was a reasonable one.
- Bar Mutual claims the panel exists to save money by keeping panel law firms' costs contained. But it readily pays the bills of large panel law firms that are very high.
- Bar Mutual's conduct amounted to a wilful obstruction of counsel's conduct of the case at a critical time shortly before a contested trial in which the insured's career, professional reputation and livelihood was at stake.
- Its reaction to the request to appoint a different firm of solicitors was to withdraw all cover, which was capricious. And it was irrational, because it removed cover for counsel who had already been approved to act by Bar Mutual itself.
- The insured person should be able to choose any competent solicitor or barrister to represent them.

Bar Mutual doesn't accept the findings in my provisional decision. It agrees that the key issue is whether the stance it took in April 2014 was fair and reasonable, in view of the circumstances at the time. But it feels strongly that the decision not to extend the terms of the discretionary cover to allow the instruction of Mr S's choice of solicitors was fair and reasonable. It has made further comments, including:

- It's not true that there was no set timetable - it had clearly said that it would review the position before the end of the week commencing 7 April 2014, when it expected to have received the outstanding information. It's not correct that it would have been a further five working days before the information was received - the five working days ran from the date when the request was made. Mr S could have expected a funding decision within three days.
- Mr S has never explained why the delay would have prejudiced his position. He wouldn't have been in a worse position had work started on the technical defence at the end of the week.
- An insurer can generally be expected to follow the advice of the barrister acting in the case, but it's ultimately for the client to decide whether to accept the barrister's advice. It can't be right that a course of action is dictated to Bar Mutual where it has considered the matter carefully and come to a different but reasonably held view. The case was referred to a claims committee, whose members are all QCs, and were well placed to reach their own view.
- It was aware Mr S was unwell, and the matter was causing him concern. It went to great lengths to explain its view to Mr S, and explain that the panel solicitors weren't obstructing his case. It wasn't reasonable for him to expect Bar Mutual to instruct his barrister to start work immediately, when it had a carefully considered and reasonable view that this wasn't the best course of action.
- No solicitors could act without instructions from both clients, so without instructions from Bar Mutual, they couldn't work on the technical defence. Any other firm of solicitors, whether on the panel or not, would have found themselves in the same situation.
- It doesn't have a blanket refusal to instruct firms from outside of its panel. Other firms are appointed. This is assessed on a case by case basis. It objected to the solicitors requested by Mr S due to the specific circumstances at the time.
- Panel solicitors are chosen carefully for their expertise, and it wouldn't have been right to appoint other solicitors with no relevant experience.
- If Mr S had engaged in discussions and been able to demonstrate that none of the suggested panel firms would have been appropriate, or that an alternative firm (and, in particular, the individual solicitors concerned) were suitably experienced, it could have considered the matter. He refused to do so and instead chose to instruct his own solicitors unilaterally, in breach of the terms of cover.
- As for instructing his barrister directly, it didn't consider this appropriate. Mr S was under severe strain. He needed a lot of support. A firm from the panel – with experience of dealing with barristers facing such complaints – was best placed to provide this support and allow the barrister to focus on the legal arguments. It wanted to ensure the case was conducted as efficiently as possible, and one way of ensuring this was by involving solicitors.
- If Mr S isn't prepared to accept the terms of cover, he shouldn't have agreed to accept cover on that basis.
- Under the policy terms, it is entitled to take over the conduct of proceedings, and appoint legal representatives to deal with them.

## **my findings**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Before dealing with the merits of the complaint, I wish to briefly mention a point regarding our jurisdiction to deal with it.

## **jurisdiction**

Our adjudicator considered that Mr S's contract as a whole with Bar Mutual was a contract of insurance, which is a regulated activity, and his complaint was about an act or omission by Bar Mutual when carrying on that regulated activity. So it was within our jurisdiction on that basis.

Bar Mutual agreed that Mr S's policy as a whole amounts to a contract of insurance. But it said it was providing discretionary benefits to Mr S under a free-standing clause in the contract, which doesn't amount to "carrying out a contract of insurance" – it's a separate activity. But as this activity is ancillary to the contract of insurance, it is nevertheless within our jurisdiction. As Bar Mutual accepted that this service has jurisdiction to consider the complaint, it didn't request a formal decision on that point, and the complaint was investigated.

Bar Mutual undertakes an insurance obligation, and by doing this it has effected a contract of insurance. Indeed, Bar Mutual accepts that the contract as a whole amounts to an insurance contract. Although the benefits in this case are discretionary, the two sets of benefits do not amount to separate contracts. I'm satisfied that performance of the benefits in the contract – including the discretionary benefits – falls within the regulated activity of "carrying out a contract of insurance". And this complaint relates to an act or omission by Bar Mutual in carrying out that contract of insurance. So it is within our jurisdiction.

## **the merits of the complaint**

Turning to the merits of the complaint, Bar Mutual agrees that the issue is whether its stance in April 2014 was fair and reasonable, but disagrees with my provisional view that its approach wasn't reasonable. It has provided further lengthy submissions in support of this view. I've considered these carefully, along with the further points from Mr S, and see no reason to change my provisional decision. I'll explain why.

Bar Mutual says its decision was reviewed by a committee of four experienced QCs, who considered all the issues and were able to come to a reasoned view. It was prepared to continue funding Mr S, but wouldn't provide funding where this committee thought the defence being proposed by Mr S's barrister was unlikely to succeed. It wanted to avoid wasting costs.

I appreciate that Bar Mutual gave the matter some thought; this wasn't a completely arbitrary decision. But I need to consider whether it was fair and reasonable, taking into account all the circumstances of the case. I don't agree that it took proper account of the situation Mr S was in, or that it was properly explained to him. The emails sent to Mr S at the time made it clear Bar Mutual would not agree to any solicitors unless they were on its panel.

Bar Mutual told Mr S in April 2014 it was a condition of providing cover that he agreed to continue instructing the existing panel solicitors and, unless he could persuade Bar Mutual that this condition should be waived, or agreed to the existing solicitors continuing to act, he would no longer be entitled to any cover at all. Bearing in mind the strain he was under, and the short time left before the hearing, I think that placed too much pressure on him. The impression was clearly that he should continue with the existing solicitors. Bar Mutual wasn't keen to consider alternatives, and put the onus on Mr S to persuade it otherwise.

Bar Mutual also made it clear it wouldn't consider any solicitors unless they were on its panel – even if Mr S did somehow manage to persuade it to change solicitors “*only a firm on the panel will be instructed.*” Bar Mutual told Mr S that because his choice of solicitors wasn't on the panel, “*there is no question of Bar Mutual instructing that firm on your behalf.*”

Bar Mutual has a panel of preferred solicitors. It is of course reasonable to do that, and it's reasonable that cases are normally referred to one of those firms. Bar Mutual says it will consider using non-panel solicitors on a case by case basis, and objected to Mr S's choice due to the specific circumstances. But it was clearly never going to consider this for Mr S; it wouldn't consider any non-panel firm – regardless of previous experience. So the decision wasn't truly based on the circumstances. Bar Mutual told Mr S it would only discuss instructing a panel firm that had previously been instructed in similar proceedings. The firm Mr S wished to instruct is a well-known and highly respected firm but Bar Mutual wouldn't even consider instructing that firm purely because it wasn't on the panel. That wasn't a reasonable basis for the decision, and placed an undue restriction on its exercise of discretion.

Bar Mutual also says it wouldn't agree to instruct Mr S's barrister directly. The reason given is that he needed a lot of support, which would be best provided by solicitors. It's not clear to me how a new firm of solicitors, who weren't familiar with the case, and who Mr S didn't want to instruct, would be better placed to support him than the barrister who was already familiar with the case, and who he was clearly happy to have representing him.

I note that the timescale for the further information requested was five working days from the request date. Bar Mutual says this means Mr S could have expected a decision within three days. But I don't think that was made clear at the time. He was told they should be able to review matters before the end of the week. That was on the assumption the information did arrive by then. There was no guarantee it would arrive, nor any indication of what would happen if it didn't, or how long Mr S would have to wait for a review in that case (and as it turned out, it wasn't received).

As I've said, it is reasonable that Bar Mutual normally refers cases to panel solicitors. But in the particular circumstances of Mr S's situation, it remains my view that Bar Mutual's approach was too restrictive and failed to have sufficient regard for his particular circumstances.

### **my final decision**

For the reasons given, I uphold the complaint. Bar Mutual Indemnity Fund Limited should:

- indemnify Mr S for the reasonable legal costs he incurred defending the disciplinary proceedings brought against him. Bar Mutual Indemnity Fund Limited must also pay interest on this at the simple rate of 8% per year from the date he paid any of these costs to the date it makes the payment\*;

- pay Mr S £750 for the distress and inconvenience caused to him.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 6 June 2016.

Peter Whiteley  
**ombudsman**

\* HM Revenue & Customs requires Bar Mutual Indemnity Fund Limited to take off tax from this interest. Bar Mutual Indemnity Fund Limited must give Mr S a certificate showing how much tax it's taken off if he asks for one.