

The complaint

Mr B is unhappy with what Aviva Insurance Limited did after he made claims on his legal expenses insurance policy.

What happened

In October 2022 Mr B contacted Aviva as he wanted assistance with a claim against a healthcare provider. Aviva asked one of its panel solicitors to consider the matter and they advised the claim wouldn't have reasonable prospects of success (as required by the policy).

Mr B said that assessment was factually wrong and not properly reasoned. Aviva agreed to seek an assessment from a different panel firm. However, one didn't have the expertise to assist and the other said there had been a previous relationship breakdown with Mr B so couldn't help either.

Mr B submitted further (though linked) claims against other healthcare providers. And he discussed next steps with Aviva. He asked it to confirm it would pay for an assessment from his own solicitors. Aviva confirmed Mr B could use his own solicitors and it would provide cover for his claim if their assessment was positive but wouldn't pay for this. There was then further discussion over whether the panel firm which had declined to act would do so. They confirmed in January 2023 they weren't prepared to do so.

Aviva reviewed matters and agreed in the circumstances to obtain and pay for a counsel's opinion on the claim's prospects of success. After reviewing matters counsel asked for a video conference with Mr B; attempts were made to arrange that but they were unsuccessful and counsel wasn't prepared to proceed without one. Mr B raised concerns about whether counsel had the right level of expertise to deal with his claim and subsequently made a complaint about him.

As a result that counsel was no longer prepared to act and Aviva agreed to appoint an alternative counsel. Their advice was provided at the end of April 2023. Counsel concluded the claims Mr B wanted to pursue didn't have reasonable prospects of success. Aviva shared redacted versions of that advice with Mr B but said it wouldn't disclose the name of the counsel who'd provided it. It declined to provide funding for Mr B's claims.

Our investigator recognised Mr B strongly disagreed with the advice counsel had provided. But she thought Aviva had gone beyond what we would expect in agreeing funding for this. And she thought it was entitled to rely on the opinion which had now been provided when declining to fund Mr B's claims. If he wanted to challenge those opinions he'd need to obtain a contrary view from a different counsel.

Mr B didn't agree. He said his contract with Aviva said his claim would be handled by a firm with extensive experience in the relevant area of law. But in this case the advice had been provided on a covert basis which didn't give him the ability to properly challenge it or pursue a professional negligence claim against the counsel who'd provided it. He didn't think it was fair of counsel to have provided their opinion without discussing matters with him and it was unfair their identity had been hidden. And he queried how the difference of view would be resolved if he did obtain a positive opinion of his own.

I issued a provisional decision on the complaint earlier this month. I said:

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

I've looked first at the terms and conditions of Mr B's policy. This says "If your claim is accepted we will provide you with a lawyer who specialises in the law relating to your claim. You do not have to find your own lawyer". And it says claims will be funded if it is more likely than not "you will recover damages or obtain any other legal remedy which we have agreed to" But if in "the lawyer's opinion" the prospects of success are no longer in your favour then Aviva will not pay any further costs and expenses. The policy defines lawyer as "a suitably experienced legal professional".

As an insurer isn't a legal expert we don't think it's in a position to carry out the prospects assessment and it should be carried out by a suitably qualified lawyer who has relevant experience. Where that has been done we think it's reasonable for an insurer to rely on a properly written and reasoned legal opinion when deciding whether a claim has prospects of success or not.

So in this case I think it was right Aviva referred the claim Mr B made in October 2022 to one of its panel firms for an assessment of its prospects of success. I also think it was right to conclude a further assessment needed to be carried out given the points Mr B raised about the factual accuracy of the initial prospects assessment.

It's unfortunate the firms it then approached weren't able to carry out that work and I appreciate this caused some unavoidable delay in the claim's progress. But I think it was reasonable of Aviva to then agree Mr B could appoint his own solicitor. However, I think it was wrong to say it wouldn't pay for them to provide a prospects assessment given the only reason that needed to happen was because Aviva wasn't able to find a panel firm who could carry this out (and the policy says it will provide a lawyer to do this).

However, I don't think that's an issue I need to consider further because Aviva appear to have recognised that further action was required here which is what led it to instruct and pay for a counsel's opinion on the claim's prospects of success. And, as that's a cost we wouldn't normally expect an insurer to fund unless there were conflicting legal opinions from solicitors, I agree Aviva has gone beyond what it needed to do here.

I appreciate it then took some time for the first counsel instructed to review matters. But I don't think that's as a result of anything Aviva got wrong. And I can see it was proactive in trying to organise the video conference that counsel thought was necessary in order to progress the claim. I understand Mr B doesn't feel that counsel was qualified to advise on the claim but I think Aviva acted reasonably in response to those concerns; it raised them with counsel who confirmed he did have the necessary experience to deal with the matter.

And the fact he wasn't then able to advise on the claim was because Mr B made a complaint about him and counsel didn't feel he was therefore able to continue. I think it was reasonable of Aviva to then agree to the appointment of a further counsel to ensure the claims Mr B had made were properly assessed.

I've reviewed those opinions and I don't think they contain any factual errors that should have been apparent to Aviva and are properly written and reasoned. I accept Mr B feels counsel should have discussed matters with him prior to reaching that assessment but that's a matter for their professional judgement; it isn't something Aviva is responsible for. And I'm aware of the identity of the counsel who carried out the assessment and I'm satisfied they

had the skills and experience to do so. As a result I think it was reasonable of Aviva to rely on those assessments when declining to provide funding for Mr B's claim.

I appreciate Mr B is concerned Aviva didn't disclose the identify of the counsel who completed the assessments to him. However, that isn't something he's entitled to under the terms of his policy. And, as I've said, I'm satisfied counsel did have the relevant skills and experience to assess his claims. I can see Aviva did provide Mr B with some information about the counsel who had carried out the assessment; I don't think it needed to provide their specific name in order for him to be in a position to challenge that assessment if he wanted to.

If Mr B does provide a contrary opinion from a barrister of his own it may be Aviva would need to appoint another barrister who both sides would agree could produce a binding opinion to resolve matters. But that's something which Aviva would need to consider if Mr B does so and based on the circumstances at the time; my understanding is that he hasn't yet done that so there isn't an issue here to consider at present.

I note Mr B is concerned he can't pursue a professional negligence claim against counsel without their details. But giving him the ability to do that isn't something he's entitled to under the terms of his policy. Aviva has explained why it didn't disclose this information to him and I don't think it treated him unfairly by not doing so.

Mr B is also concerned delays by Aviva meant limitation for some of his claims had expired by the time the prospects assessments were reached. I do think there was some avoidable delay by Aviva here as it could have confirmed more quickly it would pay for Mr B to obtain a solicitor's opinion of his own. But I haven't seen clear evidence to show Mr B would have been able to find a solicitor to carry out the assessment if that had been done. And I think some of the subsequent delay resulted from Mr B's decision to complain about the counsel carrying out the assessment which led him to withdraw and meant Aviva needed to appoint an alternative counsel.

In any case this issue was considered by counsel who concluded limitation hadn't expired on the claims Mr B wanted to bring (although in some cases it was likely to do so in the near future). And if Mr B was concerned about this I think it was open to him to issue proceedings to protect his position (as I can see he told Aviva he'd done on another claim). Taking all of that into account I don't think any delay by Aviva here has had a significant impact on the progress of Mr B's claims and I don't think there's anything it needs to do to put things right

Responses to my provisional decision

Aviva said it agreed with my provisional decision and didn't have anything to add. Mr B didn't agree and made detailed comments in response. In summary he said:

- The barristers instructed on the case were acting in the best interests of Aviva and were seeking to limit its costs. If Aviva had funded his own solicitor to do so they'd have been duty bound to act in his own interests. Instead, Aviva initially appointed a panel firm which didn't have the experience to deal with the matter.
- He thought he'd been denied the freedom to choose his own solicitor. He didn't agree Aviva had done more than it needed to by agreeing to pay for counsel's opinion and said the policy stated his claim would be handled by a firm of solicitors with extensive experience in the area of law relevant to this claim.

- He continued to feel the first counsel Aviva instructed didn't have the relevant skills and experience in relation to the Equality Act and drew attention to issues that had arisen while he was considering the claim.
- He said it was unfair the name of the counsel who did then assess the claim's prospects of success hadn't been disclosed and said this was against the principle of natural justice. And if the claim had been handled by solicitors he would have known the identity of the decision maker.
- He said because he didn't have the name he was unable to challenge the assessment through a complaint to the Legal Ombudsman or Bar Standards Board
- And he said there was nothing in the policy that prevented him from pursuing a professional negligence claim against the barrister (as he believed I'd suggested in my provisional decision).
- He thought the delay in handling the claim had disadvantaged him as he did have a solicitor willing to assess the case but Aviva weren't willing to pay their fees for doing so. And he disputed that subsequent delay resulted from his decision to complain about the counsel carrying out the assessment.

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.

I note the comments Mr B has made about the motivations of the barrister's appointed to consider whether his claims had reasonable prospects of success. However, the solicitors and barristers involved with the case, whether appointed by Aviva or Mr B, would have been bound by their professional code of conduct which requires them to act in the best interests of their client. And, as I've said, I think the assessment of the claim's prospects of success the barrister produced is properly written and reasoned and I don't think there was any reason Aviva shouldn't have relied on it.

Mr B says he should have had the freedom to choose his own solicitor. He would have been entitled to do so from the point at which legal proceedings had become necessary (so from when negotiations had failed and formal legal action was required). But I don't think that's something which fairly applies unless cover was available under Mr B's policy in the first place. And that wouldn't be the case unless it had been shown to have reasonable prospects of success.

I appreciate there were difficulties in finding a panel firm to carry out a further assessment of that. And, as Mr B has said, the policy does say a claim will be handled by a firm of solicitors with extensive experience in the area of law relevant to this claim. But that's in a section of the policy in which Aviva outlines what the benefits of using a panel firm might be. I think that applies once a claim has been accepted because it says "*if legal representation is necessary*".

In any case the issue here is that Aviva wasn't able to find a panel firm to carry out a further prospects assessment so it needed to take action to ensure Mr B wasn't disadvantaged by that. I think agreeing to pay for a counsel's opinion on the claim's prospects of success was appropriate and, as I said in my provisional decision, that's a cost we wouldn't normally

expect an insurer to fund unless there were conflicting legal opinions from solicitors. So I feel Aviva has gone beyond what it needed to do here.

Mr B had concerns about the expertise of the first counsel appointed but, as I've said, I think Aviva took reasonable steps in response to the issues he raised about this. I think it was entitled to rely on the professional judgement of counsel that he did have the necessary skills and experience to assess the prospects of success of Mr B's claim. And it isn't responsible for the interactions that counsel had with Mr B when doing so.

I recognise Mr B remains unhappy the name of the counsel who did then assess his claim's prospects of success wasn't disclosed to him. I appreciate if the claim had been assessed by solicitors he might have known the name of the person carrying it out. But as I set out in my provisional decision Aviva has explained its reasons for not providing the name of counsel and I think it had reasonable grounds in the circumstances of this case for that decision.

If it hadn't disclosed any information about the assessment to Mr B then I'd have concerns as to whether it had treated him fairly. But it has provided him with the assessment and has also given him information about the experience of the counsel who carried it out. His policy sets out the process for challenging a negative opinion on a claim's prospects of success and I think Mr B had the information he needed to do so. I don't think the question of whether Mr B can pursue his own complaint against the counsel who provided the opinion on prospects is relevant to that.

And whether the policy would cover Mr B to pursue a separate professional negligence claim isn't something I reached any view on. The point I made was that under the terms of his policy as they relate to these claims there's no requirement on Aviva to provide information about the name of counsel to him.

I've also considered Mr B's comments about the impact of the delay by Aviva in handling the claim. He's provided correspondence with a firm of solicitors who he says would have carried out the prospects assessment if Aviva agreed to them doing this. However, the focus of their emails is on a separate claim that Mr B had against a different organisation.

I accept that firm might also have been prepared to assess the claims which form part of this complaint. However, even if they had done so it's not clear to me the claim would have moved forward any more quickly. The firm made clear in correspondence with Mr B that it hadn't considered any of the documentation he'd provided to date and wouldn't be doing so unless cover was confirmed. That process could only have started from January 2023 when the panel firm confirmed it wouldn't carry out the prospects assessment which was around the same time Aviva agreed to seek counsel's opinion.

And while Mr B disagrees, I do think that some of the delay in prospects then being assessed stemmed from his decision to complain about the counsel who was carrying out that assessment. In any event, for the reasons I explained in my provisional decision, I don't think any delay resulted in Mr B losing out on the ability to bring these claims as it was open to him to protect his position in relation to this if he wanted to.

My final decision

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 2 January 2024.

James Park
Ombudsman

