

The complaint

Mr and Mrs B complain about the way Aviva Insurance Limited has handled a claim under their legal expenses insurance policy.

Where I refer to Aviva, this includes the actions of its agents and claims handlers for which it takes responsibility.

What happened

The detailed background to this complaint is well known to both parties, so I'll only summarise the key events here.

Mr and Mrs B purchased a vehicle which was of unsatisfactory quality. They attempted to reject it under the Consumer Rights Act, but the dealer refused. So in September 2020, they made a claim under their legal expenses insurance policy.

Aviva accepted the claim and appointed a panel firm of solicitors – who I'll refer to as 'L' – to act on the case. L were satisfied the claim enjoyed reasonable prospects of success and entered into negotiations with the other side.

An offer was received from the dealer's solicitors to buy back the vehicle, but it was for less than the amount Mr and Mrs B paid for it. Mr and Mrs B were unhappy with the offer and wanted their additional losses included in the claim, but L said the offer was reasonable and should be accepted.

Mr and Mrs B didn't agree with L, so they obtained a legal opinion from a solicitor of their own choice. Their solicitor believed there were prospects of obtaining a higher award and they were critical of L's slow progress of the claim and failure to issue court proceedings. They recommended that a Part 36 offer is made.

As there were two conflicting legal opinions on how the claim should be progressed and the prospects of beating the dealer's settlement offer, it was agreed that a review would be conducted in line with the policy terms. Aviva provided Mr and Mrs B with its preferred barrister and confirmed that L would draft the instructions, which Mr and Mrs B could review.

Mr and Mrs B didn't think this was in line with what the policy proposed, as it said the lawyer conducting the review would be jointly chosen. They were disappointed that Aviva had only put forward one option, which was a barrister that had already been involved in the case. They were also unhappy that L would be providing instructions.

Aviva and Mr and Mrs B did subsequently agree to a barrister. But Mr and Mrs B were unhappy that Aviva were more concerned over the cost of counsel rather than whether they were suitably qualified to advise on the specific area of law.

Mr and Mrs B raised a complaint. And when Aviva didn't uphold it, they brought it to our service. Our Investigator felt that much of Mr and Mrs B's dissatisfaction arose from the solicitor's conduct – which we can't look into. She was satisfied that Aviva has acted in

accordance with the policy terms and conditions and didn't think it needed to do anything more.

Mr and Mrs B didn't agree. They accept that we can't look into the solicitor's handling of the claim but say their complaint centres around Aviva's failure to follow the policy terms in regard to the review, and the amount of time it took to take this action.

I'm aware that matters have moved on a great deal since the complaint was referred to our service, including the receipt of counsel's review. But my assessment is limited to events that took place up until Aviva's final response letter was issued on 20 December 2022. If Mr and Mrs B are unhappy with the events that took place since that date, they'll need to raise a new complaint. And once they have Aviva's final response – or if eight weeks passes without one – Mr and Mrs B can bring that complaint to our service for investigation.

The complaint was passed to me to decide, and I issued the following provisional decision.

My provisional decision

For clarity, I agree with our Investigator that much of Mr and Mrs B's dissatisfaction stems from L's conduct and their legal advice. Aviva isn't responsible for the actions of its panel solicitors, nor is it involved in the day-to-day legal handling of a claim. And it's entitled to rely on the legal advice it's provided with. So any complaint about the solicitors needs to be raised to L directly and their regulatory body.

After Mr and Mrs B provided a legal assessment from their own solicitors which contradicted the advice of L, Aviva was required by the policy to obtain a review by a third lawyer which was jointly chosen.

The terms and conditions of Mr and Mrs B's policy says:

"We have confidence in the opinion of our appointed lawyer and rely on this when deciding if we should continue to pay the costs and expenses towards your claim.

If you do not agree with our lawyer's opinion and you find a different lawyer, at your own cost, or you already have a lawyer who supports your view, then we will be happy to offer a review of the case. The opinion of your chosen lawyer must be based on the same information regarding the claim that you provided to us.

The lawyer conducting the review will be chosen jointly by you and us. If we cannot agree on who this lawyer should be then we will ask a relevant law society to appoint one. The reviewing lawyer will assess the case and we will abide by their decision. We will pay for the cost of this review and should they decide in your favour we will also pay any cost that you incurred for your chosen lawyer's second opinion.

This review and any resulting decision will not affect your rights to make a complaint as detailed in the complaints procedure section."

I can see that Aviva initially proposed a barrister from their preferred chambers and asked Mr and Mrs B whether they were happy with that choice. I can understand why Mr and Mrs B were disappointed they weren't given a wider selection of options, but I'm satisfied Aviva invited them to say if they were unhappy with the choice. And when Mr and Mrs B did so, alternative options were explored.

Mr and Mrs B are unhappy Aviva selected a barrister that had already provided advice on the case. But I don't think that necessarily means the barrister wouldn't be suitable to

conduct the review. They're an independent lawyer and given that their previous advice was supportive of the claim, I can't see any reason why Aviva should've concluded that they were inappropriate.

However, Mr and Mrs B had a right to disagree with Aviva's selection and as the policy terms say it should be a jointly chosen lawyer, Aviva were required to consider Mr and Mrs B's proposed counsel. But looking at the subsequent correspondence, it appears Aviva were particularly insistent that a barrister from their preferred chambers was used, and Mr and Mrs B's suggested barristers were dismissed solely due to the cost.

Aviva are responsible for keeping claims costs low and this is of benefit to Mr and Mrs B to ensure their limit of indemnity isn't exhausted before the claim is brought to a conclusion. That said, there isn't anything in the policy terms that says the costs of the review is limited to what Aviva would pay its preferred chambers. So it's unclear why it rejected Mr and Mrs B's proposed barrister solely because the cost was over £1,500. In one circumstance, Aviva rejected the barrister because their fee was £1,500 plus VAT rather than £1,500 inclusive of VAT – an additional £300. This seems wholly unreasonable and unnecessarily restrictive.

As it was clear Aviva and Mr and Mrs B could not agree on a barrister, Aviva should've asked the relevant law society to appoint one in line with the policy terms. I can't see that it did so.

As such, I'm inclined to uphold this part of the complaint.

I can understand why Mr and Mrs B were apprehensive about L drafting the instructions, but it's standard practice for an insurer to ask their panel solicitor to instruct counsel. Mr and Mrs B were given the option to review the instructions and contribute to them, so I don't think there was any detriment by L being involved in this process. And I understand Aviva subsequently agreed to cover the cost of Mr and Mrs B's chosen solicitor to review the instructions too.

I do agree with Mr and Mrs B that Aviva took too long to take this action under the policy. I can see that Mr and Mrs B provided Aviva with their chosen solicitor's conflicting legal opinion in April 2022. But it wasn't until August 2022 that Aviva proposed a barrister to conduct the review.

Given that the policy sets out the process of what will happen when a customer disagrees with the legal opinion, and Mr and Mrs B had complied with that process by funding their own legal opinion, I would've expected Aviva to take the next steps promptly and without delay. It's unclear why it took that long for Aviva to initiate the review process and to start engaging with Mr and Mrs B about a jointly chosen lawyer.

In fact, by the time the final response letter was issued in December 2022, a barrister still hadn't been instructed to conduct the review. Whilst I can't fairly say there were avoidable delays by Aviva for that whole period of time, I am satisfied that Aviva's continuous referrals back to their Underwriters for advice at almost every stage contributed to the amount of time this case has taken to progress. Aviva is aware that Mr and Mrs B are in an ongoing dispute with the dealer and an offer has been made. It could be detrimental to a claim to go silent on a defendant for a long period of time and I'm persuaded this could've been handled more efficiently by the handlers involved.

As such, I'm inclined to uphold this part of the complaint.

For the failings in Aviva's service that I've identified above, I'm inclined to award compensation of £400 for the distress and inconvenience caused to Mr and Mrs B.

Responses to my provisional decision

Aviva provided the following comments:

- Whilst Aviva agrees the process took longer than it would've liked, this wasn't solely due to its actions. Mr and Mrs B raised multiple issues over the draft instructions to counsel which had to be referred back to L on numerous occasions which contributed to the delays in progressing matters.
- It was informed the quote for counsel was £1,000 - £1,500 plus VAT which is a potential difference of £600. Given the cost difference equates to potentially one third of the opinion, it's not unreasonable for it to negotiate and suggest £1,500 inclusive of VAT to preserve the limit of indemnity.
- The compensation awarded is on the high side.

Mr and Mrs B provided the following comments:

- They've lost many months whilst they've had to argue that Aviva should do what the policy says in a fair and unbiased way. Consequently, they've been unable to take steps to settle matters which has resulted in additional lost interest on their considerable capital outlay and at the same time, the cost of replacing the vehicle has risen.
- The courts use interest to compensate for delays in settlement, and they suggest a rate of 4% which Mr and Mrs B says amounts to £4.93 per day. They believe Aviva has caused six months' worth of delays, so compensation should be awarded at £867.68.
- Counsel's advice has been received and is supportive of their claim, however Aviva is yet to discuss repayment of their legal fees in obtaining the second opinion and the advice on counsel's instructions. In addition, it has refused to reimburse them for an expert's report, despite this being an integral part of the evidence provided for counsel's review.

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.

As I've said in my provisional decision, the time it took to initiate and complete the review process was too long. I've already explained that I can't fairly say Aviva are responsible for all the delays during that period of time, nor that all delays were avoidable.

That said, it was responsible for some; there were continuous referrals to Underwriters to make decisions that could've been made by claims handlers, and there were unnecessary refusals of suitable counsel because of minimal differences in costs (which I calculate to be an additional £300 out of the indemnity limit). For this, Mr and Mrs B should be compensated.

Mr and Mrs B want me to compensate them by awarding interest on their financial losses for each day of delays. But as I've said, I'm not holding Aviva responsible for all delays. And I don't have any evidence that their claim will settle for less than it would have had it been

progressed sooner. So I'm not persuaded that there's a financial loss to Mr and Mrs B's claim, and that I can fairly hold Aviva liable for it.

Having thought about the points raised by both sides, I remain satisfied that £400 compensation for the distress and inconvenience caused is fair in the circumstances.

In regard to Mr and Mrs B's comments about the present position of their case, I'm not considering these as part of this complaint. Should they be unhappy about the events subsequent to 20 December 2022, they'll need to raise a separate complaint.

My final decision

For the reasons I've explained, I'm upholding this complaint and directing Aviva Insurance Limited to pay compensation of £400.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 28 July 2023.

Sheryl Sibley
Ombudsman