DRN-4342131

The complaint

Ms Y is unhappy with what Royal & Sun Alliance Insurance Limited did after she made a claim on her legal expenses insurance policy.

What happened

Ms Y had an accident at work in 2010 and suffered injuries as a result. She used a solicitor (T) to take pursue a personal injury claim against those she thought were responsible for this. The claim was settled but Ms Y felt it had been undervalued as T hadn't obtained the right information (including an expert report) to assess the extent of her injuries.

In 2017 she sought funding under her legal expenses insurance with RSA to bring a professional negligence claim against T. The matter was dealt with by one of RSA's panel solicitors. They thought there had been a breach of professional care by T because it hadn't instructed an appropriate expert. In order to determine if that had caused a loss to Ms Y they instructed an expert to assess what would have happened if that had been done.

The report from that expert didn't evidence Ms Y's claim had been undervalued to the significant extent she thought it had. Ms Y strongly disagreed with the report. The panel firm had further discussions with the expert but he didn't change his overall conclusions. In response to a request from Ms Y the firm asked RSA if it would be prepared to fund another expert opinion but it didn't agree to do so. The panel firm didn't think the expert's opinion was unreliable or obviously wrong. It advised Ms Y that she could obtain her own expert report but that would be at her cost.

In 2022 Ms Y contacted RSA again. She now had a new diagnosis of her medical condition which she thought cast doubt on what the previous expert had said. There was some confusion over who at RSA should be responsible for dealing with the matter (and whether it was a new claim or not) which led Ms Y to refer the complaint to our service. RSA said the previous claim had been correctly turned down because it didn't have reasonable prospects of success. But it would review matters once it had received the file from the panel firm to see whether it should ask the firm to look at the further information Ms Y had now provided.

Our investigator didn't think RSA needed to fund another expert report following the initial claim Ms Y made; the panel firm said they didn't have grounds to challenge the one that had been produced and didn't support instructing another expert. But she noted the firm hadn't provided a report on the claim's prospects of success which specifically said the policy requirements in relation to this hadn't been met. However, as Ms Y had made clear she wasn't happy to proceed on the basis of the expert report that had been obtained and would be obtaining her own the claim wouldn't have progressed at that time in any case.
As a result she didn't think RSA should be responsible for any solicitors fees Ms Y incurred after funding for her claim was withdrawn. But she thought RSA should review the evidence Ms Y had now provided (including the new expert report which she had by then obtained).

If either the information Ms Y provided in July 2022 or the new expert report she'd obtained changed the position on coverage it should consider reasonable legal costs Ms Y had incurred from either July 2022 or from the date the medical report was obtained (and pay

interest at 8% on any costs refunded). And it should also pay Ms Y £150 for the inconvenience she was caused after she got back in touch with RSA in July 2022.

RSA didn't agree. It said:

- The fact Ms Y had now received a further diagnosis didn't mean the assessment carried out in 2017/2018 was incorrect. The panel firm had put further information to the expert and had extensive discussions about the case. It was entitled to rely on the advice the panel solicitors provided about this at the time which had been negative on prospects.

- The panel solicitors had received an email from Ms Y which hadn't led them to change their initial assessment (and any claim against T was now likely to be out of time in any case). Any claim against the medical expert wasn't covered by their initial referral. And the firm weren't prepared to act for Ms Y in any case.

- Ms Y might now have a new medical report but that would need to be considered by a legal professional to see whether it was court compliant. And the case would need to be considered again in full to see if there were reasonable prospects of success. Legal advice would also be required on whether any steps Ms Y had taken to protect her position had prevented limitation being an issue

- Funding had previously been withdrawn on receipt of a negative prospects assessment meaning the policy terms and conditions weren't. So it should now be for Ms Y to fund and provide her own legal opinion on prospects. If that was positive RSA would consider reimbursing the cost of this

Ms Y didn't agree either. In summary she said

- RSA should cover the legal fees she'd incurred after cover for her claim was withdrawn. Cover had wrongly been withdrawn because the panel firm hadn't properly checked the medical information about her case and the expert report it obtained wasn't fit for purpose.

- She explained in detail why she thought the issues with that report were obvious and so should have been apparent to the panel firm and to RSA. She didn't think the report was relevant to the claim she was making because it didn't address the key issues. And when cover was withdrawn she needed to take action to protect her position and prevent limitation expiring.

- She had a contractual relationship with RSA and it was responsible for the work it had sub contracted to the panel firm. So she thought it should be responsible for any failings on the part of that firm. She didn't think it had met its statutory responsibilities to ensure the goods and services supplied under her contract with it were of satisfactory quality.

- And RSA had access to all of her medical information so should in any case have identified the issues with the expert report

- The evidence she'd now obtained, including her diagnosis and the further expert report, did show the claim had reasonable prospects of success. And the panel firm had told her that cover would be reinstated if she was able to provide a supportive report. So that should now take place.

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.

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

I appreciate Ms Y feels RSA should be responsible for the actions of the panel solicitors. She's argued it sub contracted work to it. But what a panel firm does when carrying out its legal role isn't something I can consider. That's because we can only consider the covered activities set out in our rules (the Dispute Resolution Rules or DISP). Those activities include regulated activities. And "*carrying out a contract of insurance"* is a regulated activity. That's why we can consider what RSA did here.

However, the actions of the solicitors acting in their legal capacity aren't a regulated activity and don't fall within any of the other covered activities contained in our rules. So that isn't something we can look at. The solicitors are independent professionals with their own regulator and complaints procedures; Ms Y could potentially pursue any concerns she has about the action of the panel solicitors with the relevant body.

What I can consider is whether there have been any failings on the part of RSA when handling the claim. And it does look like the panel firm had some responsibility for claims handling as they told Ms Y "*we have delegated authority from your Legal Expenses Insurer to make decisions in relation to your policy. Essentially this means that we are authorised to interpret your policy, make decisions and advise you on the scope of policy cover on your insurer's behalf".* So their actions while carrying out that role are something RSA is responsible for and are something I can (and have) considered. In this decision any references to RSA therefore include its agents and claims handlers when carrying out claims handling responsibilities.

I've looked first at the terms and conditions of Ms Y's policy. In commons with other legal expenses insurance policies it doesn't cover "*any claim where there is not a reasonable chance of you winning the case and achieving a reasonable outcome*." And it also excludes "*legal proceedings where a reasonable estimate of your total legal expenses is greater than the amount in dispute".*

In relation to assessing whether a claim is likely to win it says "*in circumstances where we have chosen a representative to act on your behalf, we will pay legal expenses incurred for providing the initial assessment of the claim irrespective of the prospects of success or whether the claim is covered under this policy*."

The policy also says "*if your representative wants to consult a barrister or expert witness, we will agree if we think it is reasonable. You must give us the name of the barrister or expert witness, and the reasons why you need one*". But the policy doesn't cover "*legal expenses which apply to the period before we have agreed in writing to support your claim".*

I appreciate Ms Y strongly believes RSA should have agreed funding for a second expert opinion given her dissatisfaction with what the first expert had said. But I don't think RSA acted unreasonably in declining to agree to that. It's clear that in response to the issues she raised the panel firm engaged with the expert and questioned him further on his conclusions. I can see that Ms Y had input into those discussions and commented on a detailed follow up letter prior to this being sent to the expert. And a solicitor at the panel firm subsequently spoke in detail with the expert to understand the rationale for his conclusions.

Following that his advice, as set out in a letter to Ms Y in January 2019 was that the cost of obtaining a new medical opinion "*is not going to be paid for by your insurers because we are not going to be able say that [expert's] opinions are unreliable or obviously wrong"*. And in a further letter the following month the panel solicitor reiterated "*my professional duty simply does not allow me to support the cost of instructing another expert in the hope that he or she produces an opinion which is more favourable".*

It's not clear to me what RSA was told about that at the time. And if RSA didn't have that information I think it should have done more to question the position. But given the panel firm were clear that a further medical opinion wasn't required (and they couldn't support obtaining one) that's what they'd have told RSA if further questions had been asked. And under the terms of the policy cover is only provided for an expert witness if "*your representative*" wants to consult a barrister or expert witness. That wasn't the case here.

Ms Y feels that expert opinion was obviously wrong and that's something RSA should have picked up on. But she's acknowledged her condition is complicated and problems relating to it "*are notoriously difficult to diagnose*". I understand why she feels the expert didn't do his job properly but it's clear the panel firm weren't persuaded (having had detailed discussions with the expert) there were grounds to say his report was obviously wrong.

And I wouldn't have expected RSA to carry out its own review of the medical evidence; that isn't something it's qualified to do. The panel firm didn't feel, having consulted with the expert, that there weren't grounds to challenge this opinion or request a further medical report. I think RSA could reasonably rely on their professional opinion in relation to this.

However, while it's a requirement of the policy that a claim is likely to win (and it doesn't cover claims which will cost more to pursue than the amount in dispute) I think RSA are wrong to suggest funding for the claim was withdrawn because it didn't have reasonable prospects of success; that isn't what the panel solicitors said.

In fact their advice was that, on the basis of the expert report, there were grounds to argue there was a loss to Ms Y because the report acknowledged that a condition affecting her meant her injuries had taken longer to heal which could mean her claim had been under valued. The firm felt the impact was likely to be modest in comparison to how Ms Y felt she'd been affected but said it was happy to ask an internal specialist to review that in more detail. I appreciate the outcome of that review could have been the claim didn't have reasonable prospects of success (as it would have included consideration of whether it was proportionate to pursue) but that hadn't been established when RSA stopped funding it.

However, while RSA may have relied on the wrong ground to do so I don't think that makes a difference to Ms Y's overall position. The panel firm made clear her options were either to agree to the further review it had suggested or obtain an expert report that supported her position in relation to the loss she believed she'd suffered. But obtaining that report would be at her own expense and RSA wouldn't provide further funding unless she obtained a supportive report. Ms Y confirmed in March 2019 that she would find her own expert. Given that I don't think there was a claim here that RSA needed to fund.

I appreciate that meant Ms Y needed to engage her own solicitors to protect her own position in relation to limitation. And I understand why that was something she needed to do. But as the position on funding for her claim had been made clear to her, I don't see that or any legal costs she incurred between then and her further contact with RSA in July 2022 are something it should be responsible for.

I've gone on to think about what happened when Ms Y got back in touch with RSA and whether it should now consider the further evidence she's provided. RSA says the panel firm

told it that an email it had received from Ms Y didn't make a difference to its previous assessment. However, it's not clear what information that email contained and the solicitor doesn't give any more detailed rationale for his conclusions. In any case it doesn't appear Ms Y had the further medical report she's now obtained at that point. So I don't think RSA can rely on that email from the panel firm as a reason for not taking further action on the claim.

And the question of whether that report is court compliant isn't something that impacts whether Ms Y's claim should be accepted under the terms of her policy. Clearly if that report was to be used as part of legal proceedings it would need to be. But the question here is whether she's evidenced that the value of her claim is different (and greater) than the previous expert found.

RSA says funding was previously withdrawn on the basis of a negative prospects assessment but I've already established that isn't correct. The reason the claim didn't previously progress was because RSA weren't prepared to fund a further medical opinion and Ms Y didn't want to move forward on the basis of the existing one. The panel firm said at the time "*in terms of taking things forward, if you want a more favourable expert opinion, I think you are only going to get this by instructing a different expert*". I understand that's what Ms Y has now done and given the comments the panel firm made about policy coverage at the time I think it's reasonable to expect RSA to review that report to see if it makes a difference.

In addition, even if the claim had been turned down on the basis it didn't have reasonable prospects of success, we'd normally expect an insurer to look again at any new information a consumer subsequently provided. And, if appropriate, refer it back to panel solicitors to see if it made a different to what they'd previously said.

In this case I appreciate the panel firm have indicated that they wouldn't be able to act for Ms Y in future. That's unfortunate but I don't think it's fair Ms Y loses out on the opportunity to have the further evidence she's now provided considered as a result; I don't think she should be put in a worse position than another policyholder with the same circumstances because of a decision the panel firm has taken.

However, while Ms Y has suggested cover should be reinstated on the basis of the information she's now provided I don't think that's appropriate. It's reasonable that RSA has the opportunity to get that assessed by a suitably qualified solicitor to see if it does make a difference to previous conclusions on the extent of the loss to Ms Y.

I do agree RSA should have handled matters better when Ms Y got back in touch with it in July 2022. There does appear to have been avoidable confusion over who should be dealing with her claim. And RSA appears to have then forwarded the claim to the wrong claims handling agent. I think that will have caused Ms Y unnecessary inconvenience and I agree RSA should pay her £150 in recognition of that.

Putting things right

RSA will need to arrange for the further information Ms Y now has (her diagnosis and a new medical report) to be reviewed by a suitably qualified solicitor. If that supports her position on the value of her claim and it continues to enjoy reasonable prospects of success it will need to provide funding for that subject to the other terms and conditions of her policy.

In deciding whether the claim does have reasonable prospects of success RSA will of course be entitled to consider whether the steps Ms Y took to protect her position have prevented limitation being an issue.

If cover is to be reinstated I think it's fair RSA should pay any reasonable solicitor's costs Ms Y has incurred from the date that should have taken place. So if the information she provided in July 2022 is what makes a difference then that would be the date costs should be considered from. If it's the further medical report she's now obtained it would be from when she provided that to RSA.

And if any costs RSA are now responsible for are ones Ms Y has already paid then RSA should pay interest at 8% simple on those amounts from the date of payment to the date of settlement.

RSA will also need to pay Ms Y £150 in recognition of the inconvenience she was caused by what it got wrong when she got back in touch with it in July 2022.

My final decision

I've decided to uphold this complaint. Royal & Sun Alliance Insurance Limited will need to put things right by doing what I've said in this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms Y to accept or reject my decision before 14 November 2023.

James Park
Ombudsman