

The complaint

Mr B's complaint is about a claim he made on his Aviva Insurance Limited ('Aviva') legal expenses insurance policy.

Mr B says that Aviva treated him unfairly.

All references to Aviva include their claims handlers.

What happened

Mr B made a claim on his Aviva legal expenses insurance policy for cover to pursue various third parties.

His complaint concerns the instruction of a specific Barrister to assess the merits of his claim. Mr B says he made several complaints about the Barrister and that there is a conflict of interest in their being instructed because they gave unfavourable advice against the various NHS Trusts/surgeries. In addition, Mr B is unhappy that Aviva haven't revealed the identity of the Barrister in question.

Mr B also says he's been subjected to unreasonable delays, frustration and inconvenience which have been difficult to deal with given his health condition. He feels Aviva's conduct has led to a loss of opportunity with his claim, financial loss, distress, frustration and a deterioration in his health.

Our investigator considered Mr B's complaint and said that it shouldn't be upheld. She said that Aviva had instructed someone that was suitably qualified to advise on the merits of Mr B's claim and that there was no conflict of interest in respect of the instruction of the Barrister in question here. She also concluded that if Mr B didn't agree with the Barrister's view, he could get an opinion from someone at his own cost.

Mr B didn't agree so the matter was passed to me to determine.

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.

Having done so I don't uphold Mr B's complaint for broadly the same reasons set out by the investigator. I'll explain why.

The starting point is the policy terms. It's a requirement of virtually all legal expenses insurance policies that any intended claim has a reasonable prospect of succeeding. Mr B's policy is no exception. That means his claims needed to have over 51% prospects of succeeding in order for Aviva to cover them.

We don't think this is unfair. Litigation can be expensive. A privately paying customer wouldn't want to bear the cost if advised it is unlikely to succeed. We wouldn't expect a legal expenses insurer to fund claims in these circumstances either.

Where an insurer has declined funding in such a case, it isn't for us to evaluate the merits of the underlying claim. Instead, and as the investigator explained, we look at whether the insurer has acted fairly. So long as they have got advice from suitably qualified lawyers, we won't generally question their reliance on that advice, unless we think it was obviously wrong or based on factual mistakes. Aviva did this.

I know Aviva didn't disclose the identity of the Barrister they instructed to Mr B and that Mr B remains unhappy with this. I don't think Aviva needed to disclose this information to Mr B. The advice they were obtaining was for the purposes of satisfying themselves about whether cover was available for the claims Mr B wanted to make. And Aviva have confirmed the identity of the Barrister to this Service, so I have been able to verify that they were experienced in the area of law Mr B was asking for help with. In addition, I've seen nothing that suggests their advice was based on factual mistakes. I appreciate Mr B doesn't agree with the advice he's received but that's not something I can consider. If, as Aviva's terms set out, he was to provide an alternative reasoned opinion from a comparable Barrister, then I would expect Aviva to consider that. Equally, if he provided Aviva with any new evidence or information that has now come to light that might change the outcome of the Barrister's assessment, I would expect Aviva to refer that back to the Barrister. But as matters stand, I can't say Aviva did something wrong by relying on the legal opinion they received.

Mr B has said there's a conflict of interest in the instruction of the Barrister in question. He's cited several reasons for this. I have considered them all, but I don't think they apply here or there's any evidence to support the assertions he's made. A conflict of interest arises in a case where a legal professional would be in breach of their code of conduct or professionally embarrassed if they continued to act. So, for example where the Barrister (or the Solicitor instructing them) previously acted for Mr B's proposed opponents, knew Mr B personally, was privy to personal information about Mr B's proposed opponents or made a damaging mistake that would constitute professional negligence, such as disclosing privileged material or missing a procedural deadline. I haven't seen anything that supports that any of those circumstances apply here so I don't agree that a conflict of interest has arisen in the way that Mr B says.

Mr B has said he should have been given the freedom to choose his own Solicitor and or Barrister to provide advice in respect of the merits of his claim. I don't agree. Aviva were entitled to assess whether his claims had reasonable prospects of success in the first instance by instructing legal professionals of their choice. And given the outcome of the Barrister's advice was that the claims didn't have reasonable prospects of success, Aviva weren't able to establish that cover was available at all. So, the issue of freedom of choice doesn't arise here. In addition, there are no exceptional reasons that apply that mean that Mr B should have been entitled to instruct a representative of his choice. This includes Mr B's references to there being a breakdown in his relationship with the instructed Solicitor and Barrister. I appreciate that Mr B was unhappy with the legal representatives instructed to assess his claims, but in this complaint there's nothing that leads me to believe they weren't able to effectively conduct a review of them, such that the merits of his claims couldn't be established or that exceptional reasons apply.

Finally, I know Mr B feels that the position Aviva has taken has prejudiced his claim. Whilst it's right that Aviva haven't provided him with cover to pursue his claim, this doesn't mean he's prevented from pursuing it himself. For the reasons I've set out above, I think it was fair for Aviva to decline Mr B's claim for cover and I haven't seen anything that supports what Mr B has said about experiencing avoidable delays in this case.

My final decision

For the reasons set out above, I don't uphold Mr B's complaint against Aviva Insurance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 3 April 2024.

Lale Hussein-Venn
Ombudsman