

## **The complaint**

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

Mr F says Aviva treated him unfairly.

## **What happened**

Mr F made a claim on his Aviva legal expenses insurance policy for cover to bring a claim against the developer and seller of his home. The dispute was in respect of a right of way over a private shared driveway Mr F says he was entitled to and the developer's failure to transfer ownership of the driveway to Mr F and some other houses.

Aviva passed the claim to their panel firm to consider. They determined that Mr F's claim had reasonable prospects of success but wasn't proportionate to pursue because the loss he was claiming for wasn't quantifiable. They also said there weren't prospects of recovery against the developer, and as such the claim wasn't one the policy was capable of covering.

Mr F didn't agree. He supplied information to show the developer had substantial assets that any award he might obtain could be enforced against. The panel firm accepted this but maintained the claim still wasn't covered because they couldn't determine whether it wasn't proportionate to pursue. They said that if Mr F supplied valuation evidence to quantify his loss, they would be prepared to review matters. As things stood, Aviva said the claim wasn't one they would cover.

Overall, Mr F is unhappy with the position Aviva have taken. He's made several submissions about this, including that his loss was measurable, that the person advising at the panel firm wasn't qualified or experienced and that he's now litigating the matter himself at considerable cost. Mr F wants Aviva to fund his costs incurred in pursuing the claim as well as compensate him for the distress and inconvenience he's been put to in gathering information each time it was suggested that he wasn't covered by the policy.

Our investigator considered Mr F's complaint and concluded that it shouldn't be upheld. She said that Aviva were entitled to rely on the opinion of their panel firm. Mr F doesn't agree so the matter has been 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 won't be upholding Mr F's complaint. 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 and is proportionate to pursue. Mr F's policy is no exception. That means his claim needed to have over 51% prospects of succeeding and the sum likely to be recovered needed to be more

than the costs likely to be incurred 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 or if the amount they will recover is less than they would spend on costs. 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, 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.

I'm satisfied that the advice received from the panel firm was supervised by someone suitably qualified and experienced in the area of law that Mr F was seeking advice on. So, I think it was reasonable for Aviva to have relied on this. I can't consider the quality of the legal advice itself as that's not something that's within my remit. Firms of Solicitors are independent professionals with separate codes of conduct and a separate regulator. If Mr F remains unhappy with their advice, then he can raise this with the panel firm or complain to the Legal Ombudsman.

Mr F has said that he did quantify his loss and that this should have been enough for Aviva to determine that his claim was covered. In particular, he's referred to sums he said the developer benefitted from by selling access over the disputed land to another, which he could have done himself if the land was transferred to him when it should have been. Mr F has also talked about the diminution in value of his property if he sought to sell it with an unresolved dispute in progress. But from what I've seen he didn't provide any evidence at the time to quantify how much those claims were worth. And after Aviva declined to cover the claim, Mr F took matters forward himself by instructing his own Solicitors to litigate the matter as he was concerned it would become time barred if he didn't do so.

I asked Mr F to provide me with a copy of his Claim Form and Particulars of Claim so that I could consider these to see whether he'd quantified his claims at all. Mr F didn't supply his Claim Form, but he did provide his Particulars of Claim. Having considered the remedies he is seeking within that, I can see that the value of his claim has still not been quantified. And I've not seen any legal advice that sets out an estimation of what Mr F is expected to recover at trial. Without anything to support what Mr F says his claim is worth, I don't think Aviva were obliged to fund his claim. The absence of that information meant there was nothing to support whether it was proportionate to pursue- and as I've set out above, we wouldn't require an insurer to fund a claim in those circumstances. The fact that Mr F has chosen to pursue the claim without it being quantified is a matter for him, but it's not a risk I would expect an insurer to take.

From what I've seen, the panel firm said they'd review any evidence Mr F was prepared to supply to evidence diminution in value, but he didn't supply this or anything else that supported the quantification of his claim. And as matters stand, I've not seen anything to suggest this is currently available. The Particulars of Claim supplied by Mr F don't support this. That said the Claim Form might have given some indication of what he thought the claim was worth but Mr F hasn't provided me with this, and even if he had, I don't think it would have been persuasive evidence of the value of his claim in any event. If Mr F can supply Aviva with any further evidence to support the value of his claim, like his Solicitor's opinion on the likely amount he's expected to recover and what evidence that's based on, I'd expect Aviva to consider funding the claim in accordance with their policy terms going forward. But I don't think this should apply to Mr F's costs incurred after Aviva said they were no longer prepared to fund his claim.

Mr F has said it's unfair that Aviva aren't offering cover for a point of contract law where they may be no or little quantifiable loss but where a point of contract needs to be enforced. He says that if that's the case, this is inconsistent with the examples given in the policy which extends to recovering damages or obtaining any other legal remedy. He references scenarios like stopping a neighbour from making noise. I appreciate the point he's making but the policy requirement is for any claim to be proportionate to pursue, which accords the Court's own rules in advancing claims like the specific claim Mr F is making. And in this case the claim Mr F is making ought to have been quantifiable in some shape or form to allow the panel firm to assess whether it was proportionate to pursue, given the nature of the various matters he was claiming for (as noted within the Particulars of Claim he's supplied). In the absence of any evidence to support what those claims are worth, I can't say it was unreasonable for Aviva to turn down cover.

I know Mr F is unhappy about the information he's had to gather each time Aviva explained the parameters of cover. Whilst I appreciate this would've put him to some effort, it's a reasonable expectation that policyholders supply evidence to support their claims in order to allow insurers or their panel firms to determine whether cover is available. Indeed, the policy says:

*"You will be asked to provide evidence. Should you wish to pursue a claim the lawyer will need you to provide as much information as possible to support your case. This could include: copy of contracts witness details, correspondence with anyone regarding your claim etc. You are responsible for providing evidence to support your case at your own cost."*

I know this was inconvenient for Mr F at times, but I can't say that Aviva did something wrong. Without enough evidence to satisfy themselves of the panel firm of the legal position and therefore whether cover was available, I can't say Aviva were wrong to take the position they did.

### **My final decision**

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 26 December 2023.

Lale Hussein-Venn  
**Ombudsman**