

The complaint

Mrs N's complaint is about the handling of a claim under the legal expenses insurance section of her home insurance policy with Aviva Insurance Limited.

Aviva is the underwriter of this policy, *i.e.* the insurer. Part of this complaint concerns the actions of the agents it uses to deal with claims and complaints on its behalf. As Aviva has accepted it is accountable for the actions of the agent, in my decision, any reference to Aviva includes the actions of the agents.

What happened

In 2022, Mrs M submitted a claim to Aviva, as she wanted cover to take legal action in relation to tenants living in a neighbouring property.

Aviva instructed one of its panel of solicitors to assess the claim. The panel solicitors did not consider that there were reasonable prospects of the claim Mrs M wants to make succeeding, which is a pre-requisite of the policy. After some discussion with Mrs M, Aviva then instructed another panel firm to review the matter and provide another opinion. The second panel firm also said that they did not consider there were reasonable prospects of the claim succeeding. Aviva therefore rejected Mrs M's claim.

A few months later, Mrs M contacted Aviva to say she was unable to find her own solicitor to act. After some discussion it was apparent she wanted to take action against the landlord as well as the tenants that occupy the neighbouring property, and so Aviva arranged for the panel solicitors to consider if a claim could be brought against the landlord. However, their advice was that this would not have reasonable prospects of success either. Aviva therefore rejected the claim again.

Mrs M said she wanted to appoint her own solicitors to assess the claim against her landlord. Aviva said that this would have to be done at her own expense. Mrs M made a complaint to us about that which was not upheld.

Subsequently, Mrs M did get her own solicitor's opinion which said that the claim did have reasonable prospects of succeeding and she contacted Aviva again in early 2024. Aviva said that in light of the conflicting solicitors' opinions, it would obtain a barrister's opinion on the matter. Aviva instructed a barrister but he did not consider Mrs M's potential legal claim had reasonable prospects of success.

Aviva therefore maintained its rejection of Mrs M's claim and said it would only review the matter if she submitted her own barrister's opinion.

Mrs M was very unhappy about this. Mrs M says she had queried with Aviva whether she should get a barrister's opinion but was told a solicitor's opinion would be sufficient. Mrs M says the policy states that if she finds her own solicitor and they give a view supporting her case, Aviva would accept the opinion and would pay all associated costs. She therefore wants the cost of her solicitor's opinion on the case refunded and her claim met.

One of our Investigators looked into the matter. He recommended the complaint be upheld and that Aviva should fund another barrister's opinion from a jointly instructed barrister. This is because he said the policy terms provide that if the policyholder obtains an opinion that supports their claim, Aviva would offer a review by a lawyer jointly instructed by Aviva and the policyholder. And the policy states that if the review is favourable, then the costs incurred by the policyholder in getting their own opinion will be reimbursed. The Investigator said that while Aviva had obtained a barrister's advice, this was not a joint instruction; and the barrister's opinion did not address the potential action against the tenants or all of the points raised about the landlord. He did not therefore think Aviva was entitled to rely on the opinion to refuse the claim and should fund an opinion from a jointly instructed barrister that considers all the potential legal actions Mrs M wants to take.

Aviva accepted the Investigator's assessment. It said it would make sense for the same barrister, who already has some knowledge of the case, to be instructed but that it would consider any other barrister Mrs M wants to instruct.

Mrs M does not accept the Investigator's assessment. She says that the policy states that if she obtained her own favourable legal opinion that Aviva would reimburse the costs and the claim will be accepted. Mrs M says she would not have incurred the costs of getting her own advice if Aviva had agreed to choose a barrister or solicitor to review the matter. She wants her costs reimbursed and for her claim to proceed without the need for another opinion. However, Mrs M has also provided details of a barrister she wants to instruct.

As the Investigator was unable to resolve the complaint, it has been passed to me.

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.

Mrs M's policy provides cover for various legal disputes, including those that affect her enjoyment of her own home. However, this cover is subject to various terms and conditions. Like all other legal expenses insurance policies it requires any legal case to have a reasonable chance of succeeding in court in order to be covered under the policy. This is not unfair or unreasonable. Mrs M's policy says:

“Our lawyer will assess the evidence and if it is more likely than not that you will:

- a. recover damages or obtain any other legal remedy which we have agreed to (e.g. being paid compensation or stopping a neighbour from making noise), or*
- b. be successful in defending a claim made against you, or*
- c. make a successful appeal or defence of an appeal*

then we will fund the case for you.

If, in the lawyer's opinion:

- a. your claim is likely to be considered a waste of court time, or*
- b. the prospects of success are no longer in your favour, or*
- c. your claim has reached a point where incurring further costs and expenses would not be reasonable then we will not pay any further costs and expenses towards it. If this happens the lawyer will tell you what options would be available should you wish to continue.”*

It is normally for a claimant to establish they have a valid claim under an insurance policy, so this would mean Mrs M would have to establish the likelihood of success of her

legal case. However, ordinarily legal expenses insurers will ask one of its panel of pre-approved solicitors to advise at its own cost. Aviva did just that in this case.

We do not assess the merits of the legal claim, or the conduct of the legal case, that is not within our expertise. Our remit is to assess complaints about regulated activities, such as carrying out an insurance contract. Therefore, in a case such as this, we can only assess whether the insurance claim has been dealt with fairly.

Aviva obtained expert legal opinions on the different potential legal claims that Mrs M wants to pursue: one against the owner of the neighbouring property, regarding fencing and a shed; and the second against the tenants of the property for nuisance, harassment and personal injury. I think it acted reasonably in having both claims considered and that it was entitled to rely on those legal opinions that the potential claims did not have reasonable prospects of success in refusing Mrs M's claim.

Mrs M then obtained her own solicitor's opinion which said her claims did have reasonable prospects. The policy provides for this situation. It says-

"What can I do if I do not agree with the lawyer's opinion?"

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."

I think the above is sufficiently clear: the policy obliges Aviva to offer a legal review of the case and it only has to reimburse the costs of the policyholder's own lawyer's second opinion in the event that such a review is favourable. This means I cannot, at this point in time, reasonably require Aviva to reimburse the costs Mrs M incurred in getting her own solicitors' opinions on the merits of the claims she wants to bring against the tenants and the owner of the neighbouring property.

It is also sufficiently clear that, in the event of a disagreement about the prospects of a claim such as here, Aviva should fund an opinion from a jointly chosen suitable lawyer. It is not in dispute that given the opinions already provided, this should now be from a barrister. While Aviva did get a barrister's opinion, he was not jointly chosen. In addition, I agree with the investigator that it seems the barrister did not consider all the potential claims Mrs M wants to bring. I say this because his opinion says:

"prospects of success:

- 1. Prospects of removal of ... [neighbour's vehicle] from ... the drive = 10%*
- 2. Prospects of successfully pursuing ... [the landlord] for assault [by the tenant] = 10%*
- 3. Prospects of succeeding in a private nuisance on the evidence before me = 45%".*

Later in the opinion the barrister says: *"In conclusion I remind myself that I am advising upon a claim against the owner of the adjoining property ... and not against the occupiers of those premises."* So it seems clear the barrister did not consider the potential claims against the tenants themselves.

I agree therefore that it is reasonable that Aviva funds a further barrister's opinion which should address all the potential claims and that the barrister instructed should be agreed between the parties. The policy does not state the instructions be agreed but I think it is reasonable to expect efforts be made to also agree the specific instructions.

Mrs M has suggested a barrister she wants to instruct. The parties should therefore now liaise about this and if agreement cannot be reached as to the appropriate barrister to instruct, the policy term set out above provides that the Law Society should be asked to appoint one.

If the barrister's review is favourable then the policy terms require Aviva to reimburse Mrs M the cost of her solicitors providing favourable opinion and I would expect it to reconsider the claim, subject to any remaining policy terms.

My final decision

I uphold this complaint against Aviva Insurance Limited and require it to pay for the cost of a jointly chosen barrister to review the evidence provided to Aviva in relation to Mrs M's potential legal claims against the tenants and the landlord of a neighbouring property.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 2 April 2025.

Harriet McCarthy
Ombudsman