DRN-3553407

The complaint

Mr F's complaint is about two claims he made under his Royal & Sun Alliance Insurance Limited (RSA) legal expenses insurance policy.

All references to RSA include their claims handlers.

What happened

Mr F made two claims on his legal expenses insurance policy; one in August 2019 for problems with the installation of a bathroom and one in February 2020 about the quality of a new kitchen he'd had put in.

RSA initially accepted both claims. They were sent to panel firms to consider.

The panel solicitors for the bathroom claim said Mr F had a stable claim against the bathroom company but that they needed expert evidence to support his position before they could confirm whether he had reasonable prospects of success, as required by the policy. Mr F was told he would need to fund the cost of that report himself, so he complained to RSA. RSA told him he had the option to appeal if he disagreed with what he'd been told and asked for a senior member of staff at the panel firm to call him.

The following day the panel firm closed their file. 11 months later they contacted RSA to enquire about whether RSA would fund the claim as Mr F had found an expert to review his bathroom. But after it became clear that the cost of that report was more than he could afford, he raised a complaint with RSA.

The kitchen claim was passed to another panel firm. They said Mr F didn't have reasonable prospects of success because he didn't have expert evidence supporting the work wasn't undertaken with reasonable care and skill. They also said Mr F would need to engage the Sherriff's Officer's to find details of the kitchen company to ascertain whether his claim had reasonable prospects of recovery.

Mr F was unhappy about this. He said that he'd found a local surveyor who could review the kitchen, but the surveyor wasn't prepared to take instructions from Mr F directly. Rather he would only take instructions from a Solicitor. RSA told him the policy didn't cover the costs of panel firms instructing experts where prospects of success hadn't been confirmed but that they'd ask the panel firm to assist him further on this occasion. The panel firm did this by advising Mr F what to do in relation to instructing the expert. Mr F remained dissatisfied with the position as it didn't resolve the issue he was complaining about.

Our investigator considered Mr F's complaints in relation to his claims and concluded that they shouldn't be upheld. She said that RSA were entitled to rely on the panel firm's advice that expert evidence was necessary to prove his claims had prospects of success and that the onus was on Mr F to obtain these reports.

Mr F didn't agree so the matter was passed to me to determine. After considering everything, I issued my provisional findings to both parties by email. I said:

"I don't agree with the outcome reached by our investigator and have concluded that Mr F's complaint should be upheld. I'll explain why.

Whilst the policy terms do make it clear that claims require reasonable prospects of success, this doesn't mean that an insurer is entitled to decline every claim that requires expert evidence to support the merits of it or the prospects of recovery, unless this is funded by a policyholder.

Our longstanding approach has been that it's for a policyholder to show that they have a valid claim. Mr F did that. He provided a detailed list of defects to his kitchen and bathroom as well as photographs to support the problems he was complaining about. So I'm satisfied that he's established there's a claim Royal & Sun Alliance Insurance Limited (RSA) should consider, even if further evidence is required to conclusively assess prospects of success and recovery. The issue here is whether the evidence Mr F has provided is enough at this stage to support a claim. The list of defects as well as the photographs in my view are enough. So it's for RSA to fund and instruct suitable experts to assess the workmanship and quantum of the claims. That is part of the evidence gathering process that panel firms are instructed to prepare when a policyholder has demonstrated they have a claim. And it's not something Mr F should be responsible for obtaining or funding.

I've also reviewed one of the panel firm's concerns about prospects of recovery against one of the company's Mr F wants to claim against. I understand RSA have said Mr F would need to obtain a trace report to demonstrate prospects of recovery against that company. The concerns the panel firm have expressed aren't in my view based on any substantive evidence. They've simply suggested there might be a problem with recovery. Mr F has provided credible reasons why this isn't necessarily true. Having done that, I wouldn't expect RSA to require him to obtain a trace report at his own cost. That's something they should fund and is equally part of the evidence gathering process when a panel firm is instructed.

For the reasons set out above, I think RSA hasn't treated Mr F fairly in this case by turning down these claims and needs to do more to put things right. Specifically RSA needs to reconsider Mr F's claims and fund the instruction of suitable experts to consider both the merits of the two claims and the prospects of recovery of the one where concerns have been raised. Mr F should note that if those assessments are negative, it's unlikely we'd say RSA have to do anything more (unless the assessment is based on factual mistakes or inaccuracies) unless he obtains his own assessment to the contrary. That might be in the form of expert evidence or a solicitor's opinion, depending on the opinion he's seeking to contradict.

I am also considering a trouble and upset award in this complaint. I can also see that Mr F was put to considerable inconvenience. He tried to source several experts which took up time and effort. He referred back to the panel firms and RSA about the difficulties he encountered in each case and has talked about the distress this caused him. I understand Mr F has suffered from a significant health condition although I'm not certain of whether the symptoms he was experiencing in advance of his diagnosis coincided with the time of his claims. If so I appreciate this may have made things more difficult for him.

I'd like to invite submissions from Mr F about how RSA turning down his claims affected him specifically before I consider a trouble and upset award. Once I hear back from him on this issue I will make a recommendation and invite the parties to consider that before making a final decision."

Since issuing those findings both parties responded with detailed submissions, following which I issued a provisional decision in June 2022 as follows:

"*For the reasons set out within my provisional findings, I remain of the view that Mr F's complaint should be upheld.*

RSA feel they were entitled to rely on the panel firm's advice when turning down Mr F's request for them to fund the expert and trace reports as well as the solicitor's costs involved in obtaining them. I take the view they're conflating the requirement for a prospects assessment with what we'd say a policyholder should reasonably be expected to do when making a claim.

It has always been our approach that a policyholder needs to establish they have a valid claim before an insurer agrees to fund this. It's true that this policy, like virtually all other legal expenses insurance policies, has a requirement that the claim has reasonable prospects of success for cover to continue to be provided. But that doesn't mean the onus is on the policy holder to fund everything required to establish that.

Each claim for legal expenses insurance turns on its own facts. In this particular case, Mr F did enough to establish he had a valid claim. The evidence he provided clearly showed there were problems with both his kitchen and bathroom. There were various photographs and a list of specific defects. I appreciate that might be why RSA thought it was good enough to turn the claim over to the panel firm and leave it to them to decide the case, but that doesn't go far enough, given the specific concerns Mr F's raised and the evidence he'd already provided. The panel firm told RSA they needed expert evidence to establish the merits of the claims. By that they meant liability and quantum. They also needed to establish the prospects of recovery in respect of the kitchen claim. At that point, Mr F had provided a good deal of evidence to support his position which showed a valid and arguable claim. So what needed to come next was very much part of the evidence gathering process and therefore something that RSA should have funded- both in terms of solicitor's costs in obtaining the reports they needed, and in respect of the reports themselves.

I understand this will be of concern to RSA. They may for example receive a wealth of claims that don't show the apparent obvious validity of a claim. From this Service's perspective, we'd expect insurers to consider whether a policyholder has done enough to establish they have a valid claim before an insurer can consider things further. What that means will be different in every case. But it isn't confined to the policyholder conclusively showing they have reasonable prospects of success from the very outset. If the advice of a panel firm is that this is necessary evidence, following a policyholder establishing they have a valid claim, then broadly, we'd say that those costs form part of the insurer's responsibility in assessing the claim. And that is very much applicable to Mr F's complaint.

Fair Compensation

For the reasons set out above, I remain of the view that RSA need to reconsider Mr F's claims and fund the instruction of suitable experts to consider both the merits of the two claims and the prospects of recovery of the one where concerns have been raised.

I've also given thought to the impact of RSA's decision on Mr F. There's no doubt that their

actions had a considerable impact on him given his circumstances and state of health. They also led to distress and inconvenience. Given what Mr F has said, I think he took steps to minimise the impact of the problems he was having both with the kitchen and bathroom by seeking to remedy them whilst balancing this against preserving evidence needed for future proceedings, until his claims could be resolved.

When considering the appropriate compensation award applicable in this case, I've thought about what would have happened if RSA had agreed to fund the instruction of experts early on. I don't know whether those reports would've showed Mr F's claims had both reasonable prospects of success or recovery. But they would have allowed him to make an informed decision about how to proceed in a timely manner and minimised the impact of everything he experienced as well as the uncertainty that followed. If things had gone as they should, I'd have expected RSA to agree to the instruction experts reports in about February 2020 in the case of the bathroom claim, and March 2020, in the case of the kitchen claim. As things stood, Mr F didn't receive the final word from RSA on his complaints until March 2021. And given where we are, he's been dealing with things now for over two years.

Because of Mr F's specific circumstances and the way RSA's actions have impacted on him, I think a substantial award is appropriate for the sustained distress I think would no doubt have been compounded given Mr F's ill health together with the uncertainty of living with an unsuitable kitchen and bathroom for a sustained period whilst trying to progress things with panel firms and RSA. My award also recognises the inconvenience caused by trying to identify suitable experts at reasonable cost as well as the problems he encountered trying to instruct them, all whilst dealing with the underlying problems that were the cause of these claims. For those reasons I think RSA should pay Mr F £2,000 in recognition of this."

Since issuing my provisional decision both parties have responded. Mr F pointed out a few factual errors in my earlier decision, Specifically, he said that he didn't pay for a replacement tap in his kitchen, but rather the fitting costs of it. The tap itself was eventually replaced after several weeks of correspondence with the supplier and manufacturer. He also commented that there was about a year between the symptoms of his recent condition and having to have surgery for another condition, but both took place after he made his claims.

RSA have also responded. I've summarised their comments as follows:

- They accept that Mr F has valid claims. That's why they were passed for initial assessment to the panel firms, but this is different from a legal assessment.
- The legal advice by the panel firms was that prospects of success couldn't be confirmed without expert evidence.
- There is a marked difference in the evidence provided by Mr F in each claim; In the bathroom claim, the supplier has admitted the quality of the work was unacceptable but says the responsibility for this lies with the fitter. Quotations from other companies for the cost of remedial work advises that the best course of action is to remove the work and start again. RSA say they should have questioned this with the panel firm and are happy to do so now.
- In the kitchen claim, there is no evidence that liability has been admitted. The proposed Defendant hasn't visited the property and Mr F has not had other contractors out for advice or to provide quotations to rectify the problems. So, they don't think it's reasonable to obtain expert evidence on this themselves.
- The panel firm couldn't locate the proposed defendant for the kitchen claim on Companies House and on making further enquiries it looks like it could have been dissolved in 2017. Given this information it's fair to say that prospects of recovery on this claim are less than 51%.

- The provision of expert reports is the responsibility of the policyholder if the purpose of those reports is to determine the claim has sufficient prospects for cover under the policy to continue. It is not for an insurer to prove the claim. Rather it is for an insurer to prove an exclusion applies should they wish to decline a claim.
- The policy is in place to cover the cost of claims that have been legally assessed as having reasonable prospects of success not to cover the costs of investigating whether prospects exist.
- It's a fundamental tenet of legal expenses insurance that providers are entitled to rely on the legal advice of panel firm. My provisional decision suggests the legal advice is not to be relied upon.
- My provisional decision is inconsistent with previous investigator views or decisions made by this Service.
- They sympathise with the position Mr F finds himself in, but they were entitled to rely on the advice of their panel firms.
- The compensation award I've suggested seems unrealistically high and they ask that this be reviewed. This is because they accept the kitchen claim should be reviewed but that there are no reasonable prospects of recovery on the kitchen claim at this point.

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 remain of the opinion that Mr F's complaint should be upheld for the same reasons set out in my provisional decision.

From what RSA have said, I can see they aren't aware of the distinction between our approach to the evidential burden on policyholders whilst balancing the continuing requirement for claims to enjoy reasonable prospects of success in order for cover to continue.

As I said before, an insurer isn't entitled to decline every claim that requires expert evidence to support the merits of it or the prospects of recovery, unless this is funded by a policyholder. In Mr F's case he's provided enough evidence to show that he has a valid claim. By that I mean evidence that there is something clearly very wrong that appears, prima facie, to be the responsibility of the people that did the work to his bathroom and kitchen.

RSA are seeking to rely on the advice of the panel firms to turn down cover here. But that isn't in my view good enough when the advice given is simply that reports are required to support prospects of success and recovery. It's clear to me that RSA have now looked behind that advice when responding to my provisional findings in any event. They've done this by weighing up what evidence might point towards the bathroom fitter being responsible for the work conducted, by taking into account the opinion of the bathroom company and comments by other bathroom companies about how to put things right. That doesn't in itself confirm the prospects of success in this claim. Rather it adds to the assumption that Mr F has a valid claim that is subject to expert evidence. But I don't think those additional pieces of evidence were necessary for him to have a valid claim. He demonstrated this persuasively by showing the defects complained of both in photographs and list form. So, by the same token, I don't think Mr F needed to provide any more than he had in order to establish that he had valid claims after RSA confirmed those claims fell within cover as insured events. By that I mean he did enough to show that on the face of it, he has claims that *appear* to have prospects of success given the photographs and other evidence he's provided. And if expert evidence is required to substantiate that, then it's for an insurer to fund that as part of the normal evidence gathering process.

I know RSA thinks my findings are at odds with our approach to insurer's reliance on legal advice. I can assure them that they are not. An insurer is entitled to rely on the legal advice of a panel firm, but this isn't pure legal advice- rather it's evidence gathering in circumstances where the claims made appear to be valid in nature.

The information the panel firm provided about the prospects of recovery against the kitchen company aren't conclusive. They carried out a search on Companies House and couldn't locate the proposed defendant. They then found reference to company with a similar name on an internet search engine which may or may not be the name under which the kitchen company was trading. That company was dissolved in 2017. It is by no means clear that this is the same kitchen company Mr F contracted with- they use a different name in correspondence. And I can see that they were still corresponding with Mr F in January 2020- three years after the panel firm say they were dissolved. Given the obvious uncertainty on prospects of recovery, I remain of the view that RSA should fund an appropriate report to properly clarify the position.

Turning to RSA's submissions on my award of fair compensation. I'm not persuaded the remedy I've suggested should be altered. The award I've made is entirely within our award limits for sustained periods of distress and inconvenience. I've explained in detail what I've taken into account when making that award and made clear what it relates to, so I won't repeat that again here.

Finally, I appreciate the factual inaccuracies Mr F pointed out. I don't think they change the impact of RSA's actions on him. Whether or not he paid for the replacement tap is immaterial as I'm not asking RSA to pay for that. Rather my award is about the sustained distress Mr F suffered which was compounded by his ill health. That period of ill health is still covered in this award because the award covers the period after his claims were made.

Putting things right

I direct RSA to:

1. reconsider Mr F's claims and fund the instruction of suitable experts to consider both the merits of the two claims and the prospects of recovery of the one where concerns have been raised.

2. pay Mr F £2,000 for the distress and inconvenience caused as a result of how they handled his claims.

My final decision

I uphold Mr F's complaint against RSA and direct it to put things right in accordance with my award of fair compensation set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 22 July 2022.

Lale Hussein-Venn
Ombudsman