

The complaint

Mr G complains Aviva Insurance Limited has acted unfairly in relation to his legal expenses insurance (LEI). Mr G says the policy's hourly rate for solicitors' fees is too low and as a result, the policy isn't fit for purpose. So, he feels the policy was mis-sold.

Whilst this is a joint policy with Mrs G, as the claim and have been made by Mr G, I've referred to him throughout my decision.

What happened

- Mr G purchased his LEI policy as an add on to his home insurance policy in October 2020. The policy is underwritten by Aviva and was bought via an agent of Aviva. For ease, any reference to Aviva includes the actions of its agents.
- In May 2021, Mr G attempted to make a claim on the policy for an employment dispute his son was bringing against a former employer. At the time of making the claim Mr G provided details of the solicitor he had already involved.
- In June 2021, Aviva's legal advisors issued an opinion saying the claim did not enjoy reasonable prospect of success. In August 2021, Mr G's solicitor provided a positive prospect of success which had been received from its own Counsel. This was shared with Aviva on 12 August 2021.
- Following receipt of this, Aviva agreed to provide cover and sent Mr G's solicitor its terms of appointment - which included details of the £100 + VAT hourly rate provided for solicitors' fees (all following references to hourly rates are exclusive of VAT).
- Because Mr G's solicitor charged £185 per hour, he asked Aviva if it would increase the rate it would pay. Aviva said their panel solicitors had confirmed they could deal with this matter for £100 per hour, so this rate would also be applied to non-panel solicitors.
- In October 2021, Mr G's solicitor returned the signed terms of appointment but stated they and Mr G did not agree with the hourly rate. It was agreed funding would be backdated to when the positive Counsel prospects assessment had been received. Mr G complained about the hourly rate and Aviva didn't uphold it, so, he brought a complaint to this service.
- Our Investigator didn't think Aviva had mis-sold the policy and said it was reasonable for Aviva to rely on the £100 per hour policy term.
- Mr G disagreed with our Investigator's findings, so the complaint has been passed to me for a decision.

On 15 August 2022, I issued a provisional decision upholding Mr G's complaint. In summary I said:

In considering whether it was fair and reasonable for Aviva to restrict the hourly rate to £100 per hour, I've kept in mind the Court's position in Brown-Quinn & Anor v Equity Syndicate Management Ltd & Anor [2012] EWCA Civ 1633).

Here, the court found that legal expenses insurers had the right to restrict what it would pay a non-panel solicitor provided the remuneration wasn't so low it rendered the policyholder's freedom of choice meaningless. This means Aviva needed to have offered Mr G a reasonable choice of suitably qualified solicitors who were willing to act at the hourly rate it's willing to pay.

Aviva has confirmed their panel firm was willing and able to act for £100 per hour. Whilst I accept this, what's key here is whether Mr G had a choice of solicitors – in other words, did Aviva offer him a selection of panel firm solicitors from which he could pick one, or did it only provide him with one option. I've asked Aviva for further evidence that Mr G had a choice of suitably qualified solicitors, but Aviva has been unable to provide this evidence. Without this, I'm not persuaded Mr G was given a choice.

So, I've looked at whether Mr G would've been able to appoint a non-panel solicitor for £100 per hour. Mr G's solicitor charged £185 per hour. The national guidelines set out that the standard rate of pay for a solicitor in the area Mr G lives is £178 per hour – which is significantly higher than what the policy covered. So, by only offering Mr G a single panel firm to act for him and by restricting the hourly rate to £100 per hour – I'm more persuaded that Aviva has rendered Mr G's freedom of choice meaningless and therefore, hasn't handled his claim fairly.

I explained that although Mr G had said the policy was mis-sold, I wasn't persuaded it was based on the information I'd seen.

Based on this, I'm currently minded to uphold Mr G's complaint and require Aviva Insurance Limited to do the following:

- Reimburse the costs incurred by Mr G in relation to this claim up to the cost of £178 per hour. This applies to costs incurred from 12 August 2021.*
- Pay interest at 8% simple per annum on the costs to be paid, from the date Mr G paid them to the date of reimbursement (Aviva has the right to have these costs assessed for general reasonableness but not in relation to the hourly rate charged).*

Both parties responded to my provisional decision. Mr G accepted it and provided evidence of costs. In summary, Aviva said:

- It disagreed Mr G hadn't been given a freedom of choice. It said their terms of appointment were provided to Mr G and his solicitor which highlighted that if their terms were not agreeable, Aviva would refer the matter to its panel solicitor.
- It feels it's unfair to say they didn't provide Mr G with a choice of panel solicitors as there were corresponding with Mr G, but he continued to challenge the hourly rate.
- It thought it was unlikely Mr G would have opted to switch to a panel solicitor at the stage his legal claim was at as his own solicitor was already invested in dealing with the matter.
- Aviva queried whether it was ultimately responsible for a complaint regarding the

solicitor's cost per hour and suggested an agent - who acts as its claim handler - might be the appropriate respondent.

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'm not going to depart from the reasoning set out in my provisional decision and I'll explain why.

First, Aviva has queried whether it's responsible for Mr G's complaint about the solicitor's hourly rate. The claims handling company who issued the final response did so on behalf of Aviva as it was acting as one of its agents. So, I'm satisfied Aviva is the responsible business here.

It's not in dispute that Mr G had the right to choose his own solicitor - as the policy permits this when legal proceedings are imminent. And Aviva is entitled to limit what it pays for solicitors' fees under the policy. The key issue is whether Mr G – having been told Aviva wouldn't increase the rate it would pay a non-panel solicitor – was given a freedom of choice.

Aviva has said it approached *one* panel solicitors who said they could act on his legal claim for an hourly rate of £100. But I'm not satisfied that having one panel solicitor fulfils Aviva's responsibility of providing Mr G with a reasonable choice of suitably qualified solicitors who are willing to act at £100 per hour.

In its response Aviva appears to imply that because Mr G continued to dispute the hourly rate, it was prevented from being able to put forward a selection of panel solicitors from which he could choose. But I'm not persuaded by this, as regardless of whether Mr G wasn't happy about the hourly rate, this didn't preclude Aviva from giving him information about other panel solicitors from which he could choose from. During this time, Aviva were able to give details for one of the panel solicitors, so I'm not persuaded there was good reason for not being able to include the details of others.

Aviva has also said that even if it had offered a choice of solicitors, it doesn't think Mr G would have wanted to move his legal claim to a panel firm because his own solicitor was already invested in the matter. I must keep in mind that this is a speculative argument and it doesn't persuade me that had Mr G been given other panel solicitors to pick from, he would have chosen to stay with his own solicitor.

So, my decision remains that by only offering Mr G a single panel firm to act for him and by restricting the hourly rate to £100 per hour, I'm more persuaded Aviva has rendered Mr G's freedom of choice meaningless and hasn't therefore, handled his claim fairly.

Because of the reasons given above and the direction I'm making to uphold this complaint, I'm satisfied arguments about whether the policy was mis-sold, inevitably fall away.

My final decision

My final decision is that I uphold this complaint and direct Aviva Insurance Limited to:

- Reimburse the costs incurred by Mr G in relation to this claim up to the cost of £178 per hour. This applies to costs incurred from 12 August 2021.
- Pay interest at 8% simple per annum on the costs to be paid. Interest should be

calculated from the date Mr G paid the fees to the date of reimbursement (Aviva has the right to have these costs assessed for general reasonableness but not in relation to the hourly rate charged).

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G and Mrs G to accept or reject my decision before 10 November 2022.

Nicola Beakhust

Ombudsman