

The complaint

B, a limited company, is unhappy with what Aviva Insurance Limited did after it made a claim on the 'goods lifted' extension to its engineering insurance policy. B is represented by its broker.

What happened

B had an engineering policy with Aviva which includes an extension covering damage to property being lifted or lowered. In August 2017 its broker notified Aviva of significant damage caused when the lift of an item failed. It said this was for notification purposes only. In March 2018 the broker said the third party was intending to pursue a claim for the damage. Aviva says it tried to contact B to discuss matters but wasn't able to.

In October 2018 Aviva said in order to protect both its and B's interests it would instruct solicitors to go on record and review matters. In correspondence with the broker it said *"Aviva believe there is a case to defend, whether on the basis of liability attachment or quantum"*.

The broker and B met with the solicitors at the start of November. Following that meeting the solicitors advised the claim could only be defended on a speculative basis so liability should be admitted and an early offer to settle made. In relation to the policy (and based on information from Aviva) it said "only the claim for the loss of the [item] is covered" and *"if the Claimant...secure costs orders against the Insured, these would not be covered under the policy"*.

At the end of November the other side made a settlement offer. Solicitors advised *"if we do not accept the offer and subsequently fail to beat the offer ...we will be liable for the Claimant costs on an indemnity basis together with penalty interest on the damages"*. Aviva said in December it agreed with the advice the claim wouldn't succeed. It said if B didn't accept that advice it would have to withdraw instructions from the solicitors and make payment for the only element of the claim that was covered (the pre accident value of the damaged item).

A defence to the claim was nevertheless lodged in mid-January. Discussions then took place over possible mediation. The solicitors provided an options paper in May 2019. That said *"Aviva provided indemnity in relation to the value of the [item] claim; [B] will be liable for the balance of the claim and any costs orders made against it"*. It recommended making settlement offers to the parties. It asked for instructions from B.

Its advice was accepted by B and settlement was agreed later that year (Aviva paid the agreed pre accident value of the item under the terms of the policy) There were then further discussions over the third party costs that were being claimed. I understand these were subsequently paid by B.

It argued Aviva should reimburse it for these. It said it was Aviva's decision to defend the claim and so it should be responsible for the costs incurred. While it understood Aviva might seek a contribution towards costs relating to uninsured losses it was never made clear B

would be liable for other third party costs. If that had been made clear B would have sought to settle the claim at the outset. If Aviva had nevertheless sought to defend the claim (which it thought likely) the costs would have been incurred regardless and Aviva should therefore take responsibility for them.

Aviva didn't accept that was the case. It said it advised on a number of occasions third party costs wouldn't be covered by the policy. And it had paid all the costs of the solicitor who acted in defending the claim despite there being no cover for this under the policy.

Our investigator didn't think Aviva had acted fairly. He didn't think it was made clear to B Aviva wouldn't cover the third party costs and if had done so it wouldn't have defended the claim. He felt Aviva was the driving force behind the decision to do so and if B had sought to settle the claim Aviva would likely still have defended it. It had expressed an intention at the outset to do so and the claim was ultimately settled on its instructions. He didn't feel it was fair Aviva could take control of a claim and then pass on the resulting costs to the policyholder. He recommended Aviva pay 95% of the third party costs (based on the percentage of the damage claim it was responsible for).

Aviva didn't agree. It said the relevant section of the policy covered damage and not legal liability. It did agree to get advice from solicitors once the claim had been made but believed it was made clear costs would be B's responsibility. It said it was B's decision to pursue the claim despite the legal advice from the solicitors and it didn't accept it had control of the claim. Instructions were being provided by B and it was its decision to settle.

I issued a provisional decision on the complaint in September. In summary I said:

I've looked first at the terms and conditions of B's policy. I can see the relevant section is the 'goods lifted' extension to the policy which provides cover "in respect of Damage to property belonging to You or in Your custody or control while being lifted, lowered, handled or conveyed by Property Insured". I don't think there's any dispute the policy covered the damage to the item that was dropped and Aviva have paid out that amount.

But there's nothing in this section of the policy or more generally that covers B's legal expenses (or third party costs) in pursuing or defending a claim; the policy doesn't provide legal expenses cover. So I think Aviva acted correctly in saying the legal costs B incurred aren't covered by its policy.

Having said that I appreciate the policy does contain a general condition which allows Aviva to "take over and conduct in Your name the defence or settlement of any claim. You will also allow Us to prosecute at Our own expense and for Our own benefit any claim for indemnity or compensation against any other person and You must give Us all information and assistance required."

I don't think it would be fair in principle of Aviva to utilise that clause to defend a claim and then expect the insured to pay the costs of a decision it had taken. Alternatively I don't think it would be fair to expect the insured to pay third party costs if Aviva gave it reason to believe it would be covering these and that led the insured to take a decision (to defend) it wouldn't otherwise have made. I've thought about how that applies in this case.

Was it Aviva's decision to defend the claim?

I appreciate Aviva did appoint solicitors and said at that point it believed "there is a case to defend, whether on the basis of liability attachment or quantum". But that was on the basis of limited information given its efforts to contact B following the initial notification of the claim had been unsuccessful. And the evidence at that point suggested the claim might be out of

time.

That position changed once solicitors had reviewed matters. Their advice in November 2018 was clear that liability should be accepted and a settlement offer made. Aviva's told B's broker following that "this is a claim that cannot be safely defended, and therefore one to settle on best terms. Aviva agree that this is not a case which will be successful". It said if B nevertheless wished to defend the claim it would make payment for the element of the claim that was covered (the damaged item) and B would need to appoint its own solicitors to deal with the claim as it saw fit. That doesn't suggest to me Aviva was seeking to defend the claim once solicitors had provided advice about it.

A defence to the claim was nevertheless lodged in mid-January. But I haven't seen anything to show that was Aviva's decision. The correspondence in the lead up to the defence being lodged was between B's broker and the solicitors. And it was B which confirmed its agreement to the draft defence. I think that's consistent with other evidence showing B wanted to defend the claim. For example the solicitor's notes say B didn't want to use its policy to pay for the damage as it didn't feel it was responsible for what happened.

And when the solicitors advised the broker in November 2018 that liability should be accepted and settlement offer made they commented "I appreciate that the above is not advice that the Insured will want to hear, or readily accept" So I don't think it was Aviva's decision to defend the claim. As I've said its view by December 2018 was this wasn't a claim which could be safely defended.

I've also considered whether Aviva admitted liability on B's behalf and took the decision to settle the claim. I agree doing so would suggest it had a greater involvement in the management of the claim than other evidence might suggest. But again I don't think it did. There's correspondence from the third party solicitor in November 2018 which refers to liability having been admitted but that doesn't appear to have come from Aviva but from reports of what happened on the date of the incident itself (and what B had allegedly said at that time). I haven't seen other evidence to show Aviva conceded liability on B's behalf.

Nor have I seen evidence to show the claim was settled on Aviva's instructions. Following a May 2019 meeting and the options paper produced after that by the solicitors I can see they chased B on a number of occasions to obtain instructions. At the end of June the broker emailed to say "client [B] is happy to proceed as you have outlined".

B's broker say at a May 2019 meeting they recall B being told that they weren't to contact the third party solicitors or owners of the boat because it would prejudice Aviva's position. They argue that shows Aviva must have been involved with the case. I've reviewed the options paper produced following that meeting which doesn't reference this comment. But I don't think it's in dispute Aviva remained involved with the case because of their interest in the item insured under the policy.

And it's clear Aviva had involvement with the settlement proposals that were eventually put forward because the solicitor references acting on their authority in relation to the value of the damaged item. But for the reasons I've already explained I don't think the decision to defend the claim was taken by Aviva. And the decision to agree settlement was taken in a phone call between the solicitors and the broker (acting on instruction from B) in September 2019.

Did Aviva lead B to believe that third party costs would be covered by the policy?

I've considered whether in making the decision to defend the claim B was (or should have been) aware that third party costs weren't covered. I think the starting point here is the policy

terms. As I've already found they don't include legal expenses cover and there's nothing in those terms that would suggest these costs would be covered by the policy. So in the absence of information to the contrary I don't think B (which was represented by a broker) would have thought these costs would be covered

I've gone on to review the correspondence between Aviva, B and its broker to see whether that would have nevertheless led B to believe these costs would be covered. B's broker has drawn attention to an email Aviva sent in response to queries it raised about costs. It says it understood this to mean that Aviva might seek a contribution for those legal costs relating to items excluded from cover, but not those included under the policy (the damage to the item itself).

I agree that response could have been clearer. But I don't think it's fair to consider that email in isolation. The solicitors emailed B's broker in November 2018 (so following the email from Aviva) and said they had sought advice from Aviva and "only the claim for the loss of the [item] is covered" and "if the Claimant...secure costs orders against the Insured, these would not be covered under the policy". I think that makes the position clear and so B should have been aware of that in its subsequent decision making.

That position was reiterated in further correspondence; the solicitors told B in the options paper produced in May 2019 "Aviva provide indemnity in relation to the value of the vessel claim; [B] will be liable for the balance of the claim and any costs orders made against it". I think any confusion about the position from Aviva's email in October 2018 was remedied by what was said in subsequent correspondence. And given B was represented by its broker I think it's reasonable to say if it was nevertheless unsure about the position it could have clarified matters either by reviewing the policy terms or discussing matters with Aviva prior to further costs being incurred in defending the claim.

What costs should Aviva reimburse B for?

For the reasons I've explained I don't think Aviva did lead B to believe third party costs would be covered by the policy. And I don't think it was Aviva's decision to defend the claim. However, it was its decision to initially appoint solicitors and at that point Aviva clearly thought there could be a case to defend. As I explained at the outset I don't think it's fair in principle of Aviva to take steps to defend a claim and then expect the insured to bear the costs of a decision it had taken.

I appreciate Aviva has paid all the costs of the panel solicitors. But I think Aviva should also reimburse B for any third party costs that were incurred relating to the item insured under the policy from when it confirmed it would appoint panel solicitors on 22 October 2018 until 12 December 2018 (when it made clear the claim shouldn't be defended and should be settled on the best terms).

It's also clear Aviva had an interest in the quantum of the claim; it made clear at the outset it thought there was a claim to be defended on that basis (as well as liability). And while it said in December 2018 the claim shouldn't be defended it also made clear it should be settled on the best terms. I think it's reasonable to say that anticipated negotiations with the other side over the settlement amount.

Once B had accepted (at the end of June 2019) the claim should be settled Aviva was clearly then involved with those ongoing settlement discussions because the solicitor referenced acting on its authority in relation to the value of the damaged item. I think it's reasonable to say a proportion of the costs incurred from that date relate to Aviva's decision to protect its own position in relation to the settlement.

Given that I think Aviva should also cover third party costs relating to the settlement of the part of the claim it was responsible for (the damaged item) from 27 June 2019 when a settlement offer was made until the claim was finally resolved with agreement on costs.

Putting things right

Looking at the claim that was made I think it's reasonable to say (as our investigator) did that Aviva would be responsible for 95% of the third party costs (as that's reflects the split between insured and uninsured items which were claimed against B).

It will therefore need reimburse B with that proportion of the third party costs B paid from 22 October 2018 until 12 December 2018. And it will also need to reimburse B on the same basis for third party costs B paid relating to the settlement of the claim from 27 June 2019 until outstanding matters relating to that were resolved which I understand was in June 2020.

If a costs assessment is required in order to establish the amounts to be paid here then Aviva will also need to arrange and pay for that.

Reponses to my provisional decision

Aviva didn't have any comments on my provisional decision. B did provide further comments. It thought Aviva should reimburse 95% of the third party costs it had paid from the date of the incident to the conclusion of the claim. It argued that should be done because:

- It told Aviva about the incident when it happened in line with the policy terms and was advised by Aviva there was nothing requiring investigation at that time. Once a potential claim was notified it told Aviva about this. After loss adjusters had been appointed it was then Aviva's decision to appoint solicitors to defend the claim.
- The instructions to draw up a defence wasn't taken by it. It believed this must have been a decision taken by Aviva. And Aviva didn't withdraw instructions to the solicitors following its December email and it didn't instruct the solicitors to act on its behalf.
- It highlighted correspondence from the solicitors from January 2019 which it believed showed Aviva continued to be involved in the process and would, for example, need to sign off on any mediation with the other side. Aviva also continued to be copied in on correspondence about the claim.
- It thought Aviva should therefore be responsible for third party costs from December 2018 until June 2019. It also said Aviva should be responsible for costs incurred from the date of incident as Aviva controlled the whole process via either loss adjusters or solicitors it had appointed. It felt it had done all that was asked of it by Aviva. And it said the '*options for settlement*' section of the policy didn't say it excluded third party costs.

So I need to reach a final decision.

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.

I appreciate the '*options for settlement*' section of the policy doesn't specifically say it excludes third party costs. I also note the points B has made about its compliance with the policy terms. But as I've explained there's nothing in the policy that provides cover for B's legal expenses (or third party costs) in pursuing or defending a claim. So the policy doesn't need to provide a specific exclusion for this because it isn't something it covers at all.

I set out in my provisional decision circumstances in which it might nevertheless be fair to expect Aviva to cover these costs. That included where it had taken the decision to defend a claim itself (meaning the costs incurred were the result of a decision it had taken). Or where it had wrongly given the insured reason to believe these costs would be covered which led them to take a decision to defend a claim they wouldn't otherwise have made.

I don't see that provides grounds for Aviva to cover third party costs from the date of the incident given it hadn't taken any decision on the defence of the claim at that point. I appreciate it appointed loss adjusters but there's no dispute the policy covered damage to the item that was dropped. So, while Aviva would reasonably need to assess its liability for that, I don't think it gave B any indication it would be covering third party legal costs.

I've concluded Aviva should be responsible for those costs from October 2018 (when it instructed solicitors) until December 2018 (when it said this was a claim that should be settled on the best terms). B says the subsequent decision to submit a defence wasn't taken by it but by Aviva. But that isn't consistent with the email Aviva sent to B in December 2018 which was explicit that "*this is a claim that cannot be safely defended, and therefore one to settle on best terms*".

It isn't entirely clear what then led to a defence to the claim being lodged in mid-January. B argues this wasn't its decision but I haven't seen anything to show it was Aviva's. As I've already explained the correspondence in the lead up to the defence being lodged was between B's broker and the solicitors. And it was B which confirmed its agreement to the draft defence. That's consistent with other evidence showing B wanted to defend the claim. And the solicitors have said that while Aviva paid its costs "*instructions in relation to the claim and proceedings came from [B]*".

I appreciate Aviva nevertheless continued to have involvement with the claim after a defence was lodged. However, looking at all of the evidence (and in particular the clear view it expressed about the need to settle the claim in December 2018) I don't see there are grounds on which I could safely conclude it was Aviva's decision to defend it. I'm also mindful of the fact Aviva had already told B via solicitors in November 2018 that "*only the claim for the loss of the [item] is covered*" and "*if the Claimant...secure costs orders against the Insured, these would not be covered under the policy*". I don't see there's a basis on which I could require Aviva to cover costs beyond those I set out in my provisional decision.

Putting things right

For the reasons I've explained I haven't changed my view on the third party costs Aviva should be responsible for.

It will need to reimburse B for 95% of the third party costs B paid from 22 October 2018 until 12 December 2018. And it will also need to reimburse B on the same basis for third party costs B paid relating to the settlement of the claim from 27 June 2019 until outstanding matters relating to that were resolved which I understand was in June 2020.

If a costs assessment is required in order to establish the amounts to be paid here then Aviva will also need to arrange and pay for that.

My final decision

I've decided to uphold this complaint. Aviva Insurance Limited will need to put things right by doing what I've said in this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask B to accept or reject my decision before 20 December 2022.

James Park
Ombudsman