

The complaint

Mr M is unhappy with how Soteria Insurance Limited handled a claim he made on his legal expense insurance policy following the outcome of a previous complaint to our service.

What happened

Mr M made a medical negligence claim which settled in April 2020. He subsequently made a claim on his legal expenses insurance policy with Soteria for assistance in bringing a claim for professional negligence against the solicitors who'd dealt with his claim. Unhappy with the handling of his legal expenses claim he complained to our service.

Another Ombudsman issued a final decision in May 2023. She identified significant delay in matters being progressed and awarded compensation for that. And she said Soteria should instruct a solicitor or barrister of their choice to consider whether the claim had reasonable prospects of success and was therefore one Mr M's policy would provide funding for.

Following that, in June 2023, Mr M said Soteria weren't acting in line with the terms of his policy in arranging that assessment. He said it was proposing to instruct an external barrister which he didn't believe was in line with the process set out in his policy. He thought it was unfair of Soteria to rely on our website guidance to enable it to do so and considered it was retrospectively amending the policy to include a term which he believed was unfair.

Our investigator said the policy didn't say a prospects assessment needed to be carried out by a solicitor or restrict how Soteria could carry out its obligations in relation to this. Our normal approach was it should be carried out by a qualified lawyer (which would include a barrister). She didn't think it was unreasonable Soteria had decided to use a barrister in this case. And regardless of who that assessment had been carried out by, a consumer would always need to bear the financial burden of challenging a negative prospects assessment.

Mr M didn't agree and asked for a final decision. He provided significant comments and further submissions. However, the focus of these was on the instructions to counsel that Soteria had drafted and what subsequently happened in relation to this process. He also made comments more relevant to what he believed were the failings of the solicitors involved with his medical negligence claim. 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 this matter is understandably of great importance to Mr M and he's provided voluminous correspondence in response to our investigator's view. I've looked at those submissions but I'm only considering in this decision what happened after the Ombudsman's decision on his previous complaint in May 2023 and the issues raised by Mr M in his complaint to Soteria in June (which it responded to at the start of August).

I'm aware Mr M previously logged a separate complaint with us which I understand was in relation to more recent issues. And he said he'd be providing a summary of those matters to the investigator dealing with them. So if he wants us to consider his concerns about what happened from August 2023 onwards (and Soteria has had the opportunity to look into those matters) he'll need to contact the investigator on his other case so that can be progressed.

In this decision I'm only considering the complaint Mr M made to us in September 2023 which is about Soteria's decision to use a barrister to carry out the merits assessment of his complaint. And in relation to that the relevant rules and industry guidelines say Soteria has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.

The terms and conditions of Mr M's policy say cover is provided subject to criteria being met which include "*We consider Reasonable Prospects exist for the duration of Your claim...*" It defines reasonable prospects as "*A 51% or better chance that You will succeed with Your claim and recover damages, obtain another legal remedy We have agreed to You seeking, make a successful defence or make a successful appeal or defence of an appeal. We, or a Legal Representative appointed by Us, will assess whether there are Reasonable Prospects and will continue to assess Reasonable Prospects throughout Your claim*".

And the policy says a Legal Representative is "*The solicitors, or other suitably qualified legal experts We have appointed to act for You in line with condition 3 of the Legal Expenses Section. The Legal Representative must have appropriate expertise relevant to the type and complexity of Your claim*".

In this case Soteria decided the prospects of success of Mr M's claim should be assessed by a barrister. I appreciate the definition of Legal Representative set out in the policy doesn't specifically include a barrister but I think they would reasonably fall within the broader definition it contains which is "*other suitably qualified legal experts*". And use of a barrister wouldn't be out of line with our general approach which is that the prospects of success should be assessed by a suitably qualified lawyer with relevant expertise.

The policy does go on to explain that "*If there is a dispute about whether Reasonable Prospects exists and/or whether Your claim is Proportionate then You will be asked to provide a legal opinion at Your own expense confirming that Your claim does have Reasonable Prospects and/or whether Your claim is Proportionate. If We still disagree then We will arrange to get a final opinion from an independent barrister*".

But I don't think there's anything in that term or elsewhere in the policy that precludes Soteria from obtaining a barrister's opinion at an earlier stage. So I don't agree it is retrospectively including an unfair term in the policy. And given the previously identified delays I think it was reasonable of Soteria to have concluded an experienced barrister with significant experience of personal injury cases was now best placed to produce an opinion on the prospects of success of Mr M's claim.

But even if I was persuaded Soteria was acting outside of the policy terms (and for the reasons I've explained I don't think it's decision to instruct a barrister does fall outside of those terms) that wouldn't be something I could consider. I say that because the previous Ombudsman made clear in her directions that Soteria could choose to instruct either a solicitor or barrister to carry out the assessment of Mr M's claim.

So that decision in itself gave Soteria the freedom to have the prospects assessment carried out by either a solicitor or barrister of their choice. That means even if it was correct to say Soteria were acting outside of the policy terms they would be doing so in compliance with the legally binding final decision on Mr M's previous complaint.

And a complaint about the implementation of that decision isn't something I can consider. We can only consider the covered activities set out in our rules (the Dispute Resolution Rules – DISP). Those activities include regulated activities. "*Effecting and carrying out contracts of insurance*" are regulated activities. I think the question of whether Soteria were acting in line with the policy terms in appointing a barrister to assess Mr M's claim would fall within that regulated activity.

But complaint handling isn't in itself a regulated activity. So concerns about, for example, the implementation of a final decision from an Ombudsman aren't something we can consider in isolation. As a result, in this case if Soteria had stepped outside of the policy terms in order to take action to comply with the previous final decision then that isn't something I could consider. However, for the reasons I've already explained I think it has acted in line with those terms.

My final decision

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 1 May 2024.

James Park
Ombudsman