

The complaint

Mrs H is unhappy with what Aviva Insurance Limited did after she made a claim on her legal expenses insurance policy.

What happened

In December 2022 Mrs H contacted Aviva seeking assistance from her policy. She said she was suffering noise nuisance from barking dogs owned by the tenants of a neighbouring property. After confirming cover was in place Aviva referred the matter to a panel firm for an assessment of whether it had reasonable prospects of success (a requirement of the policy).

The panel firm said in January 2023 the claim didn't have reasonable prospects of success. It said "*usually a court will expect to see expert evidence confirming that the noise is creating a legal nuisance*". It said if Mrs H wanted to instruct such an expert she could do but should discuss court requirements with it first. Aviva queried with the panel firm what the report would be required for. The panel firm said while it did have recordings of the dogs barking these were not sufficient to establish whether the claim would have prospects of success. Aviva told Mrs H it wouldn't be funding her claim and suggested she contact the Environmental Health department of her local authority.

In response to Aviva, Mrs H provided further information on the steps she'd already taken to try and resolve the matter including contact with her local councillor and the reasons why the council weren't able to install noise recording equipment. Aviva asked the panel firm if that changed its position. It said it would want to see the correspondence between Mrs H and her local authority. Aviva asked the firm to contact Mrs H to obtain this information but says the firm didn't receive a response.

As our investigator wasn't able to resolve the complaint it was referred to me to reach a decision. Having reviewed the file, I said to Aviva I thought Mrs H had shown she had a valid claim under the policy. For example, she'd provided copies of completed diary sheets recording the dogs barking, statements from friends and family members who confirm her position on the nature and extent of the noise and her own recordings of the barking.

I said I appreciated these weren't professional recordings but the noise didn't appear faint to me. I also thought much of this information either appeared to have been provided or could reasonably have been requested at the time of Mrs H's initial claim. So I thought if expert evidence was now required that was something her policy should fund. And I asked Aviva if it would now confirm it would be progressing the claim accordingly.

Aviva didn't agree to do that. It didn't think witness statements from family and friends would hold much water in the context of a legal action. And it said the panel firm had asked Mrs H for information in support of her claim so this could be considered further. It thought new information had been sent to us which it hadn't previously been aware of and requested this be provided so it could be considered by the panel firm.

As Aviva didn't agree to my suggested way forward, I issued a provisional decision on the complaint earlier this month. In summary I said:

The relevant rules and industry guidelines say Aviva has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably

I've looked at the terms and conditions of Mrs H's policy. This does include 'Protection of property which covers "Legal costs for pursuing a legal claim and/or arrangement of mediation for a dispute relating to your property which you own or is your responsibility... following a public or private nuisance or trespass, including if there are squatters in your property." So in principle the policy could assist with the claim Mrs H wanted to make.

However, the policy doesn't cover "Legal costs where prospects of success do not exist". And the policy defines prospects of success as "where we consider there is a 51% and above chance of succeeding with your claim and enforcing any award and that it would be reasonable to advise any private paying client in the same circumstances to pursue the claim".

As an insurer isn't a legal expert we think that should be assessed by a qualified lawyer with suitable experience. So I think it was right in principle Aviva referred the matter to a panel firm for that assessment to be carried out. And an insurer is generally entitled to rely on a properly written and reasoned assessment from a suitably qualified lawyer when deciding if a claim has reasonable prospects of success or not.

I don't think the prospects assessment in this case meets that test. I don't find the logic of the assessment easy to follow and (as I appreciate Aviva also found) it's clearly wrong in its approach to the claim's prospects of recovery. But, on the question of prospects of success, it appears the panel firm concluded the claim didn't meet that test because of the absence of an expert report which would satisfy a court.

However, in relation to expert evidence (and as Aviva are aware) in the first instance it's for a policyholder to show they have a valid claim. Where they've done that, if further evidence is then required to conclusively assess whether that claim has prospects of success, that would form part of the evidence gathering process panel firms should be responsible for when carrying out their assessment. And it would be for the insurer to fund that.

In this case Aviva has suggested further evidence has been provided to our service more recently that wasn't previously available to it or the panel firm. And it says witness statements from family and friends might not be sufficient in themselves to support legal action at court. But I think they could nevertheless be relevant in assessing whether Mrs H had done enough to establish she had a valid claim. However, it does appear that some of this information may only have been provided subsequent to the initial assessment.

I've therefore considered whether Mrs H had established she had a valid claim based on the information that was available, or could reasonably have been requested, at the time of that assessment. I've seen her claim submission in which she went into considerable detail about the specific dates on which the dogs had caused problems and the action she'd taken in response to that. That included contacting the tenants and their landlord (and she said she'd included relevant correspondence).

She also explained the contact she'd had with her local authority and that she'd been completing diary sheets documenting the noise. And she said she'd sought to have noise monitoring equipment installed by the local authority but that hadn't been possible. She also referenced another witness who had heard the noise.

I think it's clear that at least some additional information in support of her position was then provided to Aviva or the panel firm because recordings of the dogs barking are referred to in the prospects assessment. That assessment also refers to having seen the logs (which I

assume means diary sheets) Mrs H provided. And in my view the recordings taken together with the supporting information Mrs H provided when making her claim in themselves demonstrate an issue with noise from dogs. So even if Mrs H has subsequently provided further evidence to us in support of her claim I think the evidence she provided from the outset was enough to show that, on the face of it, she had a valid claim.

I appreciate that in response to further information referred by Aviva the panel firm said in June 2023 that it would like “to see all the correspondence between the client and the local authority as that forms a large part of her position”. It’s not clear if Mrs H responded to that request. But Mrs H clearly referenced that issue in her initial complaint and provided information about her contact with the local authority at that time. So if this was material to the outcome on prospects and further information on that was required I think that should have been requested from her at that time.

Instead, as I’ve said, the panel firm appears to have turned down the claim on the basis of insufficient prospects because of the absence of an expert report. But as I think Mrs H had already done enough to show she had a valid claim then if an expert report was required for the purposes of conclusively establishing whether the claim had prospects that’s part of an evidence gathering process which Aviva should have funded.

I accept in order to now progress the claim Aviva might need to see further information from Mrs H about her contact with the local authority (if that hasn’t already been provided to it or the panel firm). But, in terms of the issue I’m determining, for the reasons I’ve explained Aviva wasn’t entitled to rely on the panel’s firm’s prospects assessment. And if an expert report is now required that’s something Aviva should fund.

I also think Mrs H will have been caused some unnecessary distress and inconvenience because Aviva didn’t agree to fund that report earlier. I think that has delayed the progress of her claim and caused her uncertainty over what the next steps with it should be. In order to recognise the impact of that on her I think Aviva should pay her £300.

Responses to my provisional decision

Neither party responded to my provisional 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.

As neither party has responded to my provisional decision, I don’t have any reason to change the conclusions I set out in it.

Putting things right

Aviva will need to reconsider Mrs H’s claim. If further information is required from Mrs H in order for prospects of success to be assessed Aviva is entitled to request that from her. But if an expert report is required in order to establish prospects that’s something Aviva will be responsible for funding. Aviva will also need to pay Mrs H £300.

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 Mrs H to accept or reject my decision before 19 July 2024.

James Park
Ombudsman