DRN-4952242

The complaint

Mr and Mrs K are unhappy with what Royal & Sun Alliance Insurance Limited (RSA) did after they made a claim on their legal expenses insurance policy.

What happened

In November 2023 Mr and Mrs K contacted RSA as Mrs K had been hurt in an accident and wanted to bring a personal injury claim. There was an initial discussion over whether they could use their own solicitor but they didn't agree to RSA's terms of appointment. RSA referred the matter to a panel solicitor.

In December that firm advised the claim didn't meet the policy requirements in relation to prospects of success. RSA said it wouldn't be funding it and advised Mr and Mrs K of what they would need to do to challenge that assessment. I understand Mr and Mrs K subsequently pursued the claim through their own solicitor and told RSA In February 2024 they had obtained an admission of liability from the other side. They thought that showed the assessment by the panel firm had been incorrect.

Our investigator thought it was in line with the policy terms for RSA to have referred the claim to a panel firm for prospects of success to be assessed. And she thought that assessment had been produced by an appropriately supervised paralegal and was one RSA was entitled to rely on. She thought RSA had correctly advised Mr and Mrs K of what they could do in order to challenge that assessment. As they hadn't provided a positive barrister's opinion on their claim she didn't think there was anything further RSA needed to do.

Mr and Mrs K didn't agree. In summary they said:

- They queried whether the panel firm had checked whether there was a conflict of interest prior to carrying out their prospects assessment. If it hadn't done so that might have unfairly prevented them from using their own solicitor.

- They drew attention to points in the prospects assessment which they felt didn't correctly assess whether a proper system of inspection and maintenance was in place at the location where the accident occurred.

- They said the panel firm had given them information about how to challenge the assessment that wasn't consistent with the policy terms. And they said it was difficult to find a direct access barrister who would be able to advise on a personal injury claim.

- As a result they felt the policy terms in relation to this were unfair as they didn't believe solicitors costs in instructing a barrister would be reimbursed in the event of a positive assessment. And they thought the issue of unfair policy terms was something we should consider.

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.

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

I've looked first at the terms and conditions of Mr and Mrs K's policy. This does include personal injury as one of the 'Insured Incidents' and says "*we will cover the costs and expenses for your rights after a specific and sudden accident that cause death or bodily injury to you".* I don't think it's in dispute Mrs K's injury could fall within that section of cover.

However, it's also a requirement of the policy that "*reasonable prospects exist for the duration of the claim".* And the policy defines that as "*In civil cases, to qualify as reasonable, the prospect that you will recover losses or damages (or obtain any other legal remedy that we have agreed to, including an enforcement of judgment), make a successful defence or make a successful appeal or defence of an appeal, must be at least 51%. We, or a Preferred Law Firm on our behalf, will assess whether there are Reasonable Prospects*". The policy says a preferred law firm is "*a law firm or barristers' chambers we choose to provide legal services. They are chosen because they have the proven expertise to deal with your claim. They must comply with our agreed service standard levels, which we audit regularly".*

Our long standing approach is that, as an insurer isn't a legal expert, we don't think it's in a position to carry out the prospects assessment. It should be carried out by a suitably qualified lawyer with relevant experience. Where that has been done, we think it's reasonable for an insurer to rely on a properly written and reasoned legal opinion when deciding whether a claim has prospects of success or not.

In this case I understand RSA did agree to consider the appointment of Mr and Mrs K's own solicitors to carry out the prospects assessment. But they weren't prepared to agree to its terms of appointment. So I think it was in line with the policy terms and fair that RSA asked one of its panel firms to do that.

Mr and Mrs K have queried whether a conflict of interest check was carried out. That isn't something RSA would be responsible for doing; it would be for the panel firm to advise if there was a conflict of interest and it didn't. Nor have I seen any evidence which obviously shows there was a conflict (and Mr and Mrs K haven't suggested there was). So whether the panel firm carried out a check or not (and it would be unusual for it not to have done so) I don't consider there was anything further RSA needed to do here.

I appreciate Mr and Mrs K disagree with the prospects assessment and have highlighted a particular issue in relation to it. But the question for me isn't whether that assessment was legally correct or not but whether it was one RSA was entitled to rely on. I've reviewed the assessment and I think it is properly written and reasoned. It identifies relevant considerations in relation to the claim Mr and Mrs K made and gives a clear rationale for why it believes the claim is unlikely to be successful. I appreciate the assessment was produced by a paralegal but I've seen details of the senior solicitor who reviewed it and I think they are suitably experienced (they specialise in personal injury claims including those relating to unsafe premises).
I don't think RSA would have had any reasonable grounds to question the prospects assessment and was entitled to rely on it when deciding that it shouldn't provide funding for Mr and Mrs K's claim.

Mr and Mrs K say the panel firm's advice on how to challenge that assessment conflicted with what RSA told them. I accept that firm does appear to have given different advice to RSA as it referenced instructing an alternative firm of solicitors. But RSA isn't responsible for

the actions of the panel firm. Any concerns Mr and Mrs K has about its action would need to be pursued separately as a complaint against that firm.

The key consideration here is the policy terms which say *"We may require you to get, at your own expense, an opinion from an expert that we consider appropriate, on the merits of the claim or proceedings, or on a legal principle. The expert must be approved in advance by us and the cost agreed in writing between you and us. Subject to this, we will pay the cost of getting the opinion if the expert's opinion indicates that it is more likely than not that you will recover damages (or obtain any other legal remedy that we have agreed to) or make a successful defence."*

RSA told Mr and Mrs K that *"you can obtain a barristers opinion on your claim, please note that this would done at your own expense. If their opinion returns supportive then we will reassess our position, and reimburse you for the charge of the barrister."* I appreciate the policy terms themselves don't specifically say a barrister's opinion will be required. But I think it was reasonable for RSA to conclude in this case that would be appropriate given a barrister has a higher legal standing than a solicitor. So obtaining a positive assessment from a barrister would bring finality to the issue of prospects (rather than the dispute being unresolved if there were then conflicting solicitor's opinions).

Mr and Mrs K have flagged difficulties they encountered in obtaining a direct access barrister to carry out an alternative assessment. And they think this means the policy term is unfair. The Consumer Rights Act (and accompanying guidance) sets out the things that could make a contract term unfair – essentially where a term creates a significant imbalance in the rights of the parties to the detriment of the consumer. But in deciding if a term could be unfair the Act also identifies the need to take into account the subject matter of the contract, all the circumstances existing when the term was agreed and all the other terms of the contract.

Given that context, it's important to note there's no insurance policy which covers everything that may result in a policyholder experiencing financial loss. The provision of insurance is always subject to terms and conditions and these have the effect of limiting the insurer's liabilities to its policyholders. And such terms are not inherently unfair or unreasonable.

In this case (and in common with other insurers) RSA requires that in order for funding to be provided for a claim it should have reasonable prospects of success. And the terms then provide a mechanism through which the assessment reached by a panel firm can be challenged. I don't think that's unreasonable in principle.

I accept Mr and Mrs K had difficulties in finding a direct access barrister to challenge the assessment but they only appear to have approached one set of chambers. I've carried out my own research and I've identified a number of chambers that would in principle accept direct access instructions for a personal injury claim. So I'm not persuaded the terms in this case do create a significant imbalance between Mr and Mrs K and RSA. And if Mr and Mrs K had obtained a barrister's assessment by instructing solicitors and those costs had been authorised in advance by RSA (as the policy requires) I would expect it to have reimbursed them for those costs.

My final decision

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K and Mr K to accept or reject my decision before 19 September 2024.

James Park
Ombudsman