

## **The complaint**

Mrs K's complaint is about the handling of a legal expenses claim made under the legal expenses section of her home insurance policy with Aviva Insurance Limited.

Aviva is the underwriter of this policy, *i.e.* the insurer. Part of this complaint concerns the actions of the agents it uses to deal with claims and complaints on its behalf. As Aviva has accepted it is accountable for the actions of the agent, in my decision, any reference to Aviva includes the actions of the agents.

## **What happened**

Mrs K made a claim under her policy with Aviva for cover in relation to an issue with the management company of her property. Aviva arranged for the claim to be assessed by one of its panel of pre-approved solicitors. As a result of the solicitors assessment, Aviva refused cover.

Mrs K raised a complaint about that, which was referred to us for consideration in early 2023. One of my colleagues determined that Aviva was entitled to rely on the panel solicitor's opinion of the case and if Mrs K wanted to challenge that she would need to obtain a legal opinion in her favour.

Mrs K obtained a barrister's opinion, which supported the claims she wanted to make. Mrs K provided this to Aviva but it said the barrister had not commented on the proportionality of pursuing the legal claim. Aviva said that it is a pre-requisite of cover that any legal claims be proportionate to pursue.

Mrs K brought another complaint to us about this.

One of our Investigators looked into that complaint and in August/September 2023 said the policy terms refer to the reasonableness of costs with respect to continuing to support a claim but do not state that proportionality is a condition of the initial acceptance of a claim. The Investigator said this caused ambiguity in the contract, which should be interpreted in Mrs K's favour. The investigator therefore recommended that Aviva reimburse the cost of the barrister's opinion Mrs K obtained, together with interest, and arrange and fund a joint opinion from a barrister as to the merits of the claim. The investigator also recommended that Aviva pay Mrs K the sum of £350 compensation for the distress and inconvenience that this approach by Aviva has caused her.

Mrs K accepted the Investigator's assessment.

Aviva said it would agree terms with Mrs K's chosen solicitor to act on her behalf under the policy to instruct a barrister and provide the relevant documents. Aviva was in contact with the solicitors and it was agreed that some further points could be added to the instructions for the barrister to consider. However, Aviva made clear to them that the barrister should also be asked to assess the value of the claim, to ensure the claim remained proportionate. Aviva agreed to pay counsel's fees quoted as £3,750 plus VAT and eight hours at the solicitor's usual charging rate of £300ph plus VAT.

The barrister's opinion was provided in January 2024. The solicitors asked Aviva for payment of the barrister's fee and their own costs of £5,940 (which Aviva says was significantly more than agreed). Aviva paid the barrister's fees but said the solicitor's costs would be payable at the conclusion of the claim following an audit.

Mrs K was not happy with the second barrister's opinion, as she said he had stepped outside the scope of the instructions he'd been given and asked to rely on the previous barrister's opinion she had obtained. Aviva said any request should be made through her solicitors, as they were acting for her. The solicitors said that the appropriate way forward was to get an expert surveyor's report and this would cost £1,200 plus VAT and involve six hours work for them.

Aviva agreed this further funding but also asked for an update on prospects, proportionality and case strategy. Aviva also sent details of the reserve on the claim which was at just over £35,500.

At this point Mrs K raised a further complaint. She raised a number of points. I have considered them all but have summarised her main points below:

- Aviva reintroduced a condition about proportionality that is not expressly written in her policy. Aviva should explain its actions, which are an attempt to undermine her case.
- Aviva agreed her solicitor's costs but now refuses to pay them.
- It has said it will only pay unrecovered costs but has not explained this and she doesn't know who then pays the balance.
- Aviva has set a reserve of £35,500 approximately for her claim when her policy covers up to £50,000. It has not explained this term or what an audit means.

Aviva issued a final response to this complaint in April 2024. It said it was still awaiting an update from the solicitors. It also said that the policy provides for unrecovered costs and it is normal practice to audit solicitor's fees at the end of the case; and auditing costs is a standard procedure. Aviva said it had not yet formally agreed terms of appointment with the solicitors and apologised for not doing so sooner. It said that it might be able to compromise and make some interim payments. Aviva said it was happy to discuss this with the solicitors.

Aviva also said that the previous Investigator's assessment was accepted with the caveat that it would review the details of the case once the details of the remedy or damages sought were clear and the cost of pursuing the claim can be assessed with all the facts and whether such costs are reasonable to incur. Aviva said it would expect any solicitor, panel or otherwise, to appropriately advise their client as to whether the costs incurred in pursuing a claim are reasonable when considering the claim value.

Mrs K remained unhappy with Aviva's response, so referred her complaint to us. Mrs K also raised some further points of complaint, including that the costs the previous Investigator said should be paid by Aviva have been deducted from the indemnity limit; and it is not fair for costs which were run up by Aviva incorrectly disputing her claim to be taken from her indemnity limit in this way. Mrs K also asked for a breakdown of the reserve.

Mrs K is also unhappy that Aviva sent the terms of appointment to the solicitors stating it would pay £150ph for work going forward, as she says the policy does not limit the legal fees this way.

One of our Investigators looked into the matter. The Investigator explained that she could not consider the concerns Mrs K has about the list of costs applied against the indemnity limit; the hourly rate or whether certain fees should come out of her indemnity limit as part of this complaint, as they were raised after the final response letter in April 2024 and therefore would have to be considered separately.

The Investigator confirmed that she could consider the lack of explanation of the terms audit and reserve; not paying Mrs K's solicitor's costs until the end of the case; that she has had to pay interim bills and wants interest added when she is reimbursed and that Aviva is seeking to reintroduce a proportionality condition that she says is not in her policy and which has already been addressed by us.

Having considered these matters, the Investigator did not recommend the complaint be upheld. She said that auditing the costs at the end of the case is usual practice and it is fair for proportionality to be considered. The Investigator also thought that Aviva had answered Mrs K's queries about what reserve and audit meant in the context of her policy.

As the Investigator was unable to resolve this complaint, it has been passed to me.

### **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.

#### Prospects of success and proportionality

Mrs K's policy says that it will require a lawyer's assessment to confirm that there are reasonable prospects of the legal claim she wants to bring succeeding but also that:

*"When considering your case the lawyer:*

*a) Has a legal obligation not to waste court time and to keep the costs to a level that the court would consider reasonable.*

*b) Will estimate the likely costs of your case and consider if they would be acceptable to a reasonable person who was paying those costs themselves.*

*c) Will agree with you, where possible, a course of action where the costs and expenses would be considered reasonable by the court.*

*If, in the lawyer's opinion:*

*a) your claim is likely to be considered a waste of court time, or*

*b) the prospects of success are no longer in your favour, or*

*c) your claim has reached a point where incurring further costs and expenses would not be reasonable*

*then we will not pay any further costs and expenses towards it."*

I note the comments of the previous Investigator that dealt with Mrs K's complaint in 2023 that the policy does not mention proportionality as a condition of cover commencing. However, no final decision was made on that complaint. That is important because it is only an ombudsman's final decision that is binding on Aviva.

Following that Investigator's assessment of Mrs K's earlier complaint, Aviva agreed to fund another barrister's opinion but still considered that the value of the claim and proportionality needed to be assessed.

The policy says that it will be entitled to estimate likely costs and consider if they would be acceptable to a reasonable person who was paying the costs themselves. I think that would reasonably include reference to the value of the claim in proportion to the likely costs.

I also note that the barrister's opinion dated December 2022, said although there was no express condition about proportionality in the establishment of a claim, it is a condition of both establishment and continuation that it be reasonable to bring the claims. He said it is a false distinction to say an insurer can withdraw cover for disproportionate claims but can't refuse cover if the claim is disproportionate, so it must be that to establish cover a policyholder must have a more than 50% chance of success and that it would be reasonable to incur costs and to run those claims. He did state that determining whether a claim is proportionate might not be solely a monetary exercise and the importance of the claim and the importance of the remedy sought would also be relevant.

I agree with this interpretation. Even if the policy could have been clearer about proportionality needed to establish an initial claim, it is not a reasonable expectation that this should not be part of the test to initiate a claim.

So for the claim to be covered, it requires reasonable prospects of success and that it would be reasonable to incur costs and run the claim and that the costs not be disproportionate to the remedy being sought.

Given this, I am satisfied that Aviva was entitled to request the barrister instructed by Mrs K's solicitors assess the value of the claim, as well as prospects, so that it can assess whether it is proportionate to pursue and it would be reasonable to run the case and incur costs doing so. I do not agree that in doing so it was trying to introduce terms that are not in the policy.

However, having said all that, this does not seem to be a live issue, as far as I am aware, because the claim has not been refused on the basis of proportionality.

#### Proposal to audit legal fees

The policy is one of indemnity, and essentially provides cover for reasonable unrecovered costs. That is any costs that cannot be recovered from the other party to the dispute. In any legal dispute, it is possible that one party is ordered to pay the other party's costs. If this happens in this case, and the other party is ordered to pay towards Mrs K's costs, then they would be considered to have been recovered and therefore not covered by the policy. So Aviva's liability for the costs left to pay can't be known until the end of the case. Therefore I don't think that Aviva is obliged to make any interim payments for costs.

Aviva is therefore entitled to audit the costs for reasonableness at the conclusion of the case, that is reasonable in terms of time spent and rate charged. This is the usual practice with legal costs and is to Mrs K's benefit as well as Aviva's as it helps ensure that her indemnity limit is used properly. Panel solicitors have already agreed to such terms and the terms of appointment that Aviva asks non-panel solicitors to sign also state that this is the arrangement.

While Mrs K's solicitors had not signed the terms of appointment at the time of this complaint, they were made aware of those terms in correspondence.

Aviva also points out that it has in fact paid all necessary costs for the claim to proceed to

getting the barrister's opinion, so did not make the solicitors wait for any payment of those costs, so there has been no detriment to Mrs K as a result of this practice. Mrs K says she had to pay an invoice in February 2024 but the solicitors knew Aviva would not pay those costs then, so that was a matter between her and her solicitors.

I do not consider I can reasonably order Aviva to agree different terms with Mrs K's chosen solicitors but I am pleased to note that Aviva has said it would be possible to agree some interim payments and that it would discuss this with her solicitors. I think this is reasonable.

I can see that Aviva wrote in March 2024 to explain what the terms audit and reserve meant. Mrs K later asked for a breakdown of the reserve but this was after the date of the final response letter to the complaint I am dealing with, so I cannot address that here.

### **My final decision**

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K to accept or reject my decision before 10 March 2025.

Harriet McCarthy  
**Ombudsman**