

The complaint

Ms B's complaint is about the handling of a 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

In May 2023, Ms B contacted Aviva to make a claim for breach of contract in relation to work at her property. Aviva passed the matter to one of its panel of pre-approved solicitors to assess the claim. In July 2023, the solicitors said they did not consider there were reasonable prospects of the legal claim Ms B wanted to make succeeding and that it would also be disproportionate to pursue. Aviva therefore said it would not cover the claim, as the policy excludes claims that do not meet these criteria.

Ms B says the panel solicitors offered to help her with a small claims court application and asked Aviva for permission to do so but this was refused in October 2023.

In November 2023, Ms B asked for her options and Aviva told her that if she could get her own favourable legal opinion it would consider the matter again.

Ms B is very unhappy with this and the claim process, as she says she invested a significant amount of time and energy providing information to the solicitors when her claim was bound to fail given the claim value. She also says the policy had been mis-sold, as this was not made clear to her.

Aviva does not accept that it has done anything wrong in its handling of the claim. It says the policy requires claims to be proportionate and have reasonable prospects of success and it is entitled to rely on the solicitor's advice about this.

Aviva also said that just because a claim is not covered does not mean the policy was mis-sold. However, Aviva listened to the initial sales call and said the representative had not read out the main features and exclusions of the legal expenses cover, so offered a refund of the premium she had paid for this part of her policy.

Ms B declined this and brought the complaint to us. Ms B says her claim has been mismanaged by Aviva, as there's a two-stage validation of any claim: the first stage to check there is a valid policy and that the event complained of is covered and the second a legal assessment to check it meets the policy terms in relation to prospects and proportionality. Ms B says the value of the claim should have meant the claim was rejected after that first validation stage and she should not have had to spend time and energy submitting documents and communicating with the panel solicitors to assess proportionality and prospects. Ms B says she has a disability and so this was especially onerous for her.

Ms B has also made a number of other points in support of her complaint. I have considered everything she has said but have summarised her main points below:

- If small claims court cases would be disproportionate to pursue then this should be made clear in the policy terms. This was not made clear, so this is a case of mis-selling.
- She asked Aviva for information on the number of claims declined on proportionality grounds but was refused this information.
- Whether a claim is proportionate will mean different things to different people and the policy does not set out clearly what would be considered disproportionate.
- Her claim failed to proceed because Aviva was not prepared to challenge the panel solicitor's decision.
- The only way to challenge the reasonableness of the decision is for her to incur expenses getting her own legal opinion. This is a financial burden that negates the benefit of have legal expenses cover in the first place.
- The panel solicitors reached their opinion without have a copy of the contract in question.
- The solicitors agreed the loss to her was foreseeable and that it is therefore potentially recoverable; they also advised her to go to the small claims court and the respondent might agree to settle; and said they could help prepare the required documents if Aviva agreed. This suggests there are reasonable prospects of her case succeeding.
- Even without the benefit of legal knowledge and expertise, Aviva should still pick up on this inconsistency of the solicitor's decision and ask them to explain themselves accordingly.
- She received no evidence from Aviva or the panel solicitors to explain why her case does not have reasonable prospects of success, such as case law around remoteness of the loss. As such, the decision appears subjective and extremely unfair, particularly as the only way to challenge this now is at her own cost.

Ms B says she wants Aviva to authorise the panel solicitors to prepare the case for the small claims court, pay compensation and apologise to her for its mishandling of her claim.

One of our Investigators looked into the matter. She did not recommend that it be upheld, as she was satisfied that Aviva had acted fairly and reasonably and was entitled to refuse cover for the claim for the reasons it had. The Investigator also said we could not require Aviva to change how it processes its claims. The Investigator also said that the agents did not sell the policy, so did not address this part of the complaint.

Ms B did not accept the Investigator's assessment. Ms B made a number of points in response to the Investigator. Again, I have considered everything she has said but have summarised her main points below:

- Aviva accepted fault in some areas and offered a full refund of premium, which is not reflected in the Investigator's assessment.
- While the Investigator cannot tell Aviva to change its processes, we can comment on whether its processes are fair, in particular for disabled customers being asked to invest considerable time and effort into the process, to find later their claim has failed. The investigator's assessment failed to understand and address this.
- She is disabled with a chronic, debilitating condition and she cannot afford to spend time and energy pursuing claims and complaints that are bound to fail.
- Aviva should be fair and transparent and the policy and if claims that fall within the threshold of the small claims limit will always fail on proportionality then this is something the customer should be told at the outset, so they understand the cover being provided.
- Aviva agreed she had not been provided with all the information required to make an informed decision about buying the policy and agreed to refund the premium but this is not reflected in the Investigator's assessment.
- She asked for details of the number of claims declined on the grounds of proportionality against those that had been accepted because they met the proportionality threshold. This information should have been provided to demonstrate the policy is only really of value for larger claims. It is important information for customers to have and consider before choosing to take this cover otherwise there is a risk policies will be mis-sold.
- Aviva did sell this policy and the complaint is about Aviva.

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

I issued a provisional decision on the matter earlier this month. I provisionally determined that I would not uphold this complaint. I have copied my provisional findings below:

"Was the way this claim was processed fair to Ms B?"

The Investigator is correct that we cannot require insurers to change their processes generally but we can consider if the process has been applied fairly in Ms B's particular circumstances.

Aviva is required by statute to separate its legal expenses business from its other liabilities. It does this by appointing agents to deal with legal expenses claims on its behalf. Given this, it is reasonable and right that the agents check that there is a valid policy in place with Aviva, and that the policy terms cover the type of claim the policyholder wants to make, before progressing any claims.

I do not agree with Ms B that it would be a reasonable expectation that any assessment about the merits of the legal claim (to include prospects of success and proportionality) should also be done by the agents at this stage. This is because these are matters for lawyers to assess. Only a suitably qualified lawyer can properly assess the value of the claim and it would be wrong for Aviva, as an insurer (or its agents acting on its behalf) to predetermine a legal matter. Aviva (and its agents) are not able to provide legal advice, they are only able to act as an insurer. And even if it is apparent at such an early stage that the claim has a low monetary value, there may be other factors that mean that is not the only criteria for determining proportionality.

It is a principle of insurance law that it is for the claimant to establish, on the balance of probabilities, that they have a valid claim under a policy – so this would include establishing that it has reasonable prospects of success. However, it is usual in legal

expenses policies for the insurer to appoint panel solicitors to assess the prospects of a legal claim at its own cost, rather than insist on policyholders doing so at the outset of a case. Once the initial validation stage had passed, Aviva therefore instructed their panel solicitors to assess the merits of Ms B's claim.

While I note what Ms B has said about her personal circumstances, I don't think this was unreasonable and I do not think this was unfair to Ms B. Her claim was considered properly by lawyers and I am not able to criticise Aviva for this.

Was Aviva entitled to reject the claim?

Ms B's policy provides cover for contract disputes. In line with all other legal expenses insurance policies of which I am aware, this is subject to terms requiring the case to have reasonable prospects of success and that it be proportionate to pursue. Ms B's policy says:

"Our lawyer will assess the evidence and if it is more likely than not that you will:

a. recover damages or obtain any other legal remedy which we have agreed to ...

In addition, the lawyer will also consider proportionality (this means the amount of damages being pursued compared with the estimated costs to pursue your case), and ...

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."

We generally consider that reasonable prospects would mean more likely than not to succeed (i.e. a more than 51% chance).

It is not my role to assess the merits or value of Ms B's underlying legal claim but whether Aviva has acted fairly and reasonably in handling the insurance claim. So long as Aviva has obtained independent legal advice on prospects from suitably qualified lawyers, we will not generally question its reliance on that advice, unless we think it was obviously erroneous or based on factual mistakes. For the avoidance of doubt, I've seen nothing in this case to justify such a conclusion.

The panel solicitors wrote to Aviva and said:

"1. The value of the claim (less than £1000) means that it would not be proportionate for [them] to act.

2. We assessed the losses to be pursued as potentially "too remote" in law, meaning we could not confirm there is a 51% or better chance of success."

I have not seen any detailed reasoning to support the remoteness argument but I have also not seen anything to support that this is incorrect. I have also not seen any evidence that the solicitors changed their minds and said the loss was foreseeable.

In any case, as the claim also fails to meet the policy requirements for proportionality, I do not think I need to take that point any further.

It is usual practice that if the insurer has already paid for a legal opinion that says there are no reasonable prospects of success, that the policyholder would need to provide a contrary opinion if they do not agree. I don't think that's unfair and I do not think it is reasonable to expect Aviva to pay for a second legal opinion, unless there is something so obviously flawed with the first one that it should be obvious it cannot rely on it. It is also not for Aviva to challenge this opinion and it is entitled to rely on the advice of the suitably qualified legal experts to reject Ms B's claim.

So if Ms B wants Aviva to reconsider her claim, she'd need to provide a contrary legal opinion that her claim does have reasonable prospects and is proportionate to pursue.

The solicitors have not said Ms B's claim has no chance of success, only that it does not meet the threshold for cover under the policy for Aviva to pay their fees. Therefore the fact the solicitors said that if Ms B issued a claim in the small claims court the other party might settle and that it could (if Aviva agreed to fund them) assist Ms B in doing this, does not mean they think there are reasonable prospects [and] taking the matter to the small claims court does not change the fact that the legal fees involved would be more than the claim is worth and so would be disproportionate.

Information request

Ms B asked Aviva for general information about the number of claims rejected on proportionality grounds to assess if the policy is only of use for higher value claims. Aviva says this is commercially sensitive information.

I am unable to require Aviva to provide such information. Any complaint[s] about information requests are to be addressed to the Information Commissioner's Office. I do not think this information is relevant to my determination of Ms B's complaint. I say this because I can only consider Ms B's complaint about the refusal of her claim and whether that was fair and reasonable. Whether other people's claims of the similar value are covered or not does not impact my determination of her complaint.

Was the policy mis-sold?

Ms B has said the policy was mis-sold because it doesn't set out clearly that low value claims would not be covered, as they would be considered to be disproportionate.

The policy was sold by Aviva and it issued its own final response letter regarding this part of the complaint, while its agents responded to the complaint about the claim. I am satisfied therefore that this can be addressed as part of this decision. I have therefore considered Ms B's complaint about the sale of the policy and clarity of the policy documents regarding proportionality. Having done so, I do not intend to ask Aviva to do anything further. I will explain why.

I do not think that it is the case that all claims worth less than the small claims court limit would necessarily be disproportionate, as there may be other non-monetary remedies sought depending on the case. I think the terms set out above are sufficiently clear to alert policyholders that low value claims might not be covered.

In any case, most legal expenses policies I am aware of would have similar terms and I also note this was an optional add-on to Ms B's home insurance. Therefore, even if I accepted that the policy should have been worded differently and was mis-sold for this reason, I think it is unlikely Ms B would have opted not to take it and it is unlikely she would have got any other alternative policy that did not have a similar term. So her position is no different in my opinion.

In addition, even if I considered the policy had been mis-sold the usual remedy is to refund the premiums and Aviva has already offered this. Ms B should contact Aviva directly if she now wishes to accept this."

Responses to my provisional decision

I invited both parties to respond to my provisional decision with any further information or arguments they want considered.

Aviva has confirmed it has nothing to add.

Ms B has also responded. She says it is unfair and unreasonable for me to conclude she would still likely have taken out this policy, if she had known that small claims would not be covered, especially as I did not ask her about this. She says this needs to be removed from my decision. Ms B says all she asked for a decision on is whether she had the right information on which to be able to decide on the policy at the point of sale. She maintains that she did not have all the right information and that she bought the policy on the assumption it would help her pursue legal claims worth less than £10,000.

Ms B also says that these policies are useless in most cases and she has been denied the information to be able to prove this and is saddened that we do not consider it is important to protect customers in this regard.

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.

Having done so, and as neither party has added anything further about the claim, I see no reason to change my provisional findings. I therefore remain of the opinion that Ms B's claim was handled fairly and Aviva was entitled to refuse cover.

With regard to the alleged mis-sale of the policy, Ms B says she has been denied the information that would help her prove these policies are being mis-sold generally. I explained in my provisional decision that I am unable to require Aviva to provide the information Ms B requested about other peoples' claims; and that it is not relevant to my consideration of her complaint about the refusal of her claim and whether that was fair and reasonable anyway. This remains the case.

Ms B is also unhappy I have said she was unlikely to have opted not to take the cover, if she had known that small claims court cases might not be covered.

I set out in my provisional decision why I did not think the legal expenses cover was mis-sold to Ms B. Firstly, I concluded that the policy was sufficiently clear that claims would be assessed for proportionality, and therefore that there was a possibility that low value claims might not be covered. So, I did not think that the policy wording was misleading or unclear. I remain of this opinion.

I also noted that the legal expenses cover was an add-on to Ms B's home insurance policy. It therefore seems to me that the home insurance would have been the main focus of Ms B's decision to buy the policy. In addition, I explained that most other legal expenses policies have similar wording, so if Ms B had not opted for this policy, she would have been unlikely to find any other policy that covered her claim. While I note what Ms B has said in response to my provisional decision, I remain of the opinion it is likely she would still have taken this policy, even if it had been worded differently for these same reasons. Therefore, I also remain of the opinion that Ms B's position would not have been any different, if she had known claims like the one she has brought here would not be covered.

I also explained in my provisional decision that, in any event, the remedy for mis-sale would usually be the refund of the premiums and Aviva has already offered this. So, even if I am wrong and the policy was mis-sold, and Ms B would not have opted to take it if she had known more about the cover provided, Aviva has already offered the remedy that I'd likely award anyway. I also see no reason to change this conclusion. Ms B should contact Aviva directly if she now wishes to accept the refund.

My final decision

I do not uphold this complaint, as I don't think Aviva Insurance Limited needs to do anything more to settle the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B to accept or reject my decision before 27 January 2025.

Harriet McCarthy
Ombudsman