

The complaint

Mr H and Mrs W's complaint is about the rejection of a claim under the legal expenses section of their household insurance policy with Aviva Insurance Limited. Mr H has been the main correspondent on the complaint, so I will refer to him throughout.

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 September 2021, Mr H made a claim under the policy, as they wanted cover in relation to a dispute with their neighbour. The neighbour had issued a court summons against Mr H alleging he had damaged a boundary wall.

At the end of September 2021, Aviva rejected the claim as it said it only covers disputes about damage caused to his own property and does not cover defending a claim for damage.

I understand there was no further communication between Mr H and Aviva until August 2022, when Mr H contacted Aviva to dispute the rejection of the claim. Aviva maintained its position but told Mr H to put his points in writing and it would review them.

Aviva says it did not receive any further communication until June 2023, when Mr H asked it to review the matter again. Mr H said the dispute was about a retaining wall securing his property and therefore was about interference with his property rights. Aviva agreed to review the matter and passed the claim to one of its panel of pre-approved solicitors to assess.

The solicitors said the evidence was that it was agreed the wall belonged to the neighbour and they would need photos and a causal link between the damage to the wall and interference with Mr H's enjoyment of his property. The solicitors did not think the claim had reasonable prospects of success, because although Mr H had provided a surveyor's report supporting his claim, this was not of the required format for court action. The panel solicitors said that if the surveyor could produce a supportive report that was compliant with the court requirements, they would reconsider the matter and it might mean there was a more than 51% chance of the claim succeeding.

Aviva also pointed out that the evidence provided by Mr H referred to notices having being served by the neighbour about Mr H's use of the driveway (which they allege is the cause of the damage to the wall) in late 2018, it therefore suggests the dispute started before or around the time he took out the policy. However, Aviva said it would review matters if he could provide the information the solicitors requested

Mr H is unhappy with this. He says Aviva considered the claim under the property disputes section of the policy but said it was about a boundary wall, when it was about interference with his use and enjoyment of his home. He says Aviva did not assess the claim fully. Mr H says he had to defend the proceedings brought by the neighbour and were unsuccessful. As result, he incurred around £150,000 in his own costs, and costs and damages he was required to pay his neighbour. Mr H says that Aviva left him “*high and dry*”.

Aviva maintained its position that it had handled the claim in line with the policy terms and the claim was correctly declined. Mr H therefore brought his complaint to us.

One of our Investigators looked into the matter. She did not recommend the complaint be upheld, as she was satisfied that Aviva was entitled to rely on the solicitor’s assessment of the claim

Mr H does not accept the Investigator’s assessment. He says she has not understood the complaint raised. Mr H has made a number of points in response to the Investigator’s assessment. I have considered everything he has said but have summarised his main points below:

- The complaint is against the claims-handlers and not Aviva.
- The complaint is not about the rejection of the claim in 2023 on the basis that there were no reasonable prospects of success but about the rejection of the claim in September 2021 and failure to properly assess the claim at that time.
- Mr H’s use, enjoyment and right over his property was affected by the claim brought against him and the remedy being sought was interfering with how Mr H was using or enjoying his rights over his own property.
- The policy states that cover is applicable for costs and expenses to “*pursue or defend a claim for damages*” and, under the property disputes section, the first insured event is “*a dispute relating to the interference of your use, enjoyment or right over your home*”. It does not state that a claim has to relate to damage to the insured’s property. If there is any ambiguity in the wording, a decision should be determined in his favour.
- Mr H didn’t dispute the rejection of the claim in 2021 because he accepted Aviva’s decision but didn’t fully appreciate the complexity of the policy cover applicable. This is why he was forced to defend the claim at his own expense.
- It should not be his duty to have to stipulate what specific sections of cover he wanted the claim to be considered against. Instead, it was for Aviva to consider the claim which has been made against all applicable policy sections of cover and to request further information if necessary, to understand the nature of the dispute.
- In 2023, the claim was rejected due to the claim not having reasonable prospects of success, which was on the basis that Mr H had been unsuccessful at trial. However, Mr H instructed lawyers to represent him in the defence of the proceedings which had been brought against him and they advised that his claim had reasonable prospects of success, which is why he continued to defend the claim.
- It is disingenuous for Aviva to seek to rely on prospects of success with the benefit of hindsight. If it had accepted the claim at the outset and provided indemnity for him to defend the claim, it is probable that the claim would have been progressed in the same way and with the same result.
- If the claim had been accepted, it is fair that an assessment of prospects would have been made, based upon the information that was available at the time the claim was reported. If this was positive, and the evidence gathered by the Mr H’s own lawyers as the litigation progressed meant that the defence at all times continued to hold positive prospects, this would mean that the claim satisfied the requirements of the policy terms at all times, including going into the court hearing.

As the Investigator was unable to resolve the 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.

Aviva provides the legal expenses cover, it is the insurance underwriter backing the policy. However, it uses agents to deal with legal expenses insurance claims on its behalf. The policy document does explain this. The legal expenses section of the policy says: *"Legal expenses is underwritten by Aviva Insurance Limited. Claims-handling is managed by ...[our agents]"*.

But in any event, Aviva is required by statute to separate its legal expenses business from its other liabilities and it uses claims-handling agents to achieve this. The claims-handling agents are acting on behalf of Aviva and it is responsible for anything they do. Therefore the complaint is correctly set up against Aviva.

The particulars of claim made against Mr H say that he built his property building up the level of his driveway and using a boundary wall that belonged to the claimant neighbour as a retaining wall. The neighbour says the wall was never intended to be a retaining wall and was not adequate for that purpose and the use of it as such by Mr H has damaged it

Mr H disputes he significantly raised the ground level of his property. Mr H obtained a surveyor's report dated September 2021, that said if the wall is inadequate and not properly supporting his property then it would be a statutory nuisance.

Mr H's policy provides cover for various legal disputes. The section relevant to his complaint says:

"Property disputes

What is covered

The property disputes section covers your main home and, for this section only, includes any other home you own or rent.

A dispute relating to the interference of your use, enjoyment or rights over your home.

A dispute relating to damage to your home ..."

The only property damage is to the wall which is agreed belongs to Mr H's neighbour, so there is no cover under that part of the policy term set out above. There was therefore no cover for defending the damage claim brought against Mr H.

While Mr H says his solicitors assessed that his defence of the claim against him had reasonable prospects, this does not mean it should have been covered under the policy with Aviva. There is no cover for a dispute relating to damage to the neighbour's property. Given this, I am not persuaded that there any reason for me to require Aviva to reimburse Mr H for any of the costs he incurred in defending the claim brought against him, or the costs and damages he was ordered to pay his neighbour.

There is also cover under the policy for a dispute *"relating to the interference of your use,*

enjoyment or rights over your home.”

Mr H is correct that this section of cover does not require there to be damage to the policyholder's home. It can include a variety of issues, such as noise nuisance or obstruction of access for instance.

Mr H says the claim brought by the neighbour and the fact he was seeking damages caused him interference with his property rights. However, I am not persuaded that this is a reasonable interpretation of the policy. The legal claim brought against Mr H will have impacted him but for there to be cover under the policy, the dispute has to arise from the interference, rather than the interference arising from the legal dispute.

I cannot see any evidence that Mr H brought a counterclaim against the neighbour, so there is no evidence that he incurred any costs of such action.

I have however, considered whether Aviva should have assessed any potential interference claim in 2021.

While the policy covers the costs of a dispute relating to the interference of Mr H's use and enjoyment or right over his property. Any claim would have to be for Mr H to assert his rights over his property, or to seek damages or other relief for interference with his use and enjoyment of his home. It would not include defending a claim made against him.

In 2021 Mr H submitted the particulars of claim received from the neighbour, the claim form and a letter from his surveyor. Mr H's surveyor said in his letter of September 2021 that the neighbour's failure to provide support of Mr H's driveway would be a statutory nuisance. This was on the basis he thought the neighbour had excavated his land which necessitated the formation of a retaining wall, which the neighbour is liable to maintain. This was part of the dispute – the neighbour says Mr H built up his driveway, which meant the boundary wall became a retaining wall but this was not its original purpose.

While the surveyor's letter mentions statutory nuisance caused to Mr H. I do not think this in itself was enough to have expected Aviva to consider a claim for action against the neighbour for interference with Mr H's use, enjoyment of rights over his home. In addition, there was nothing in the claim form, or the correspondence from Mr H until 2023, that indicated Mr H wanted to bring his own claim for nuisance or interference with his property rights; the claim form says he wanted to defend the action brought against him.

Mr H says it should not have been for him to stipulate the nature of the claim he wanted to make but it is for a claimant to establish they have a valid claim under a policy. A policyholder might not always know their legal rights but there was no expression from Mr H that he considered the wall itself, or its condition, was interfering with his use and enjoyment of his home. I have no evidence that he made any counterclaim in the proceedings either. I do not therefore think Aviva did anything wrong in rejecting the claim as it did in 2021.

However, even if I am wrong about that, it seems to me that even if Aviva should have considered the potential claim for interference in 2021, Mr H's position would be no different than it is now. I will explain why.

Mr H says that when he contacted Aviva again to ask it to review that matter, it rejected the claim again on the basis he has lost the court case. However, I can't see evidence of that. The papers instead show that Aviva asked its panel solicitors to retrospectively assess a potential claim for interference.

The solicitors assessed both the defence of the damage claim and any potential claim Mr H

might have had for interference with his use and enjoyment of his property.

The solicitors did not think there were reasonable prospects of defending the claim made against him relating to the damage to the wall. They also did not think there were reasonable prospects of any claim for interference succeeding, as there was not enough evidence that the damage to the wall is causing him a nuisance. The solicitors did say that if Mr H could obtain a court compliant surveyor's report and evidence of a causal link between the damage to the wall and his use and enjoyment of the property, it might change the prospects assessment.

I see no reason to think this would have been any different if this merits assessment had taken place in 2021. So even if it had been assessed in 2021, the outcome would have likely been the same: that there was no cover for defending the property damage claim made against Mr H and no cover for pursuing a claim for damages or other remedy for interference with Mr H's *use*, enjoyment or rights over his home.

Having considered everything carefully, I do not think that Aviva has done anything wrong. I think it has acted fairly and reasonably and in line with the policy terms.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Mrs W to accept or reject my decision before 28 April 2025.

Harriet McCarthy
Ombudsman