

## The complaint

Mr S is unhappy with what ARAG Legal Expenses Insurance Company Limited did after he made a claim on his legal expenses insurance policy.

## What happened

Mr S wanted his policy to fund a professional negligence claim against a barrister who had acted for him in a dispute. A previous complaint to our service considered ARAG's actions before April 2024. At that point ARAG had agreed to obtain counsel's opinion on whether the claim had reasonable prospects of success (a requirement of the policy) and, following a breakdown in relations between Mr S and the panel firm previously appointed, an alternative firm was asked to draft instructions.

Counsel's advice was received in August 2024. That concluded the claim was unlikely to succeed because although there had been breaches of duty by the barrister it wasn't established those caused loss to Mr S. He disputed that opinion in correspondence with the panel firm but it didn't think his comments impacted the prospects outcome. As the policy requirements in relation this weren't met ARAG said it wouldn't be funding the claim.

Our investigator thought ARAG had caused confusion over which policy applied to the claim Mr S was making. But she was satisfied she had the correct terms (and in any event there was no difference in the wording of the provisions relevant to this claim). She thought the legal opinion (from counsel) was properly written and reasoned and from a lawyer with relevant experience. She thought it was reasonable of ARAG to have relied on it. It had wrongly declined a request from Mr S for the policy terms but as he already had this information she didn't think there was further action it needed to take. She didn't think there had been a delay by ARAG in responding to his complaint.

Mr S didn't agree. He said

- ARAG had relied on incorrect policy documentation and hadn't provided the correct terms following his request. This prevented informed challenged and undermined procedural fairness.
- Counsel's opinion had been provided on the basis the underlying claim involved High Court proceedings (with permission to appeal refused). But evidence he'd provided showed these were County Court proceedings with no appeal. So counsel's opinion was factually incorrect and it wasn't fair or reasonable of ARAG to have relied on this. And he'd had to make payments based on enforcement action that followed from those contradictory procedural positions.
- It wasn't appropriate of ARAG to have preferred counsel's opinion over publicly recorded information about the court records. Doing so undermined public confidence in the complaints and redress system. Nor had we considered the impact of his concerns on the court's jurisdiction and the enforceability of its judgement.

So I need to reach a final 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.

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

I've thought first about the policy that applies to this claim. ARAG has accepted it used the incorrect terms when referencing this. However, the key issue is whether it acted fairly in declining the claim on the basis it didn't have reasonable prospects of success. And there's no difference between the two policies as they relate to that.

So, while I understand why Mr S felt he wasn't being treated fairly as a result of what ARAG got wrong, that hasn't in fact made a difference to the progression of his claim. Given that I don't think there's anything ARAG needs to do to put things right here. Similarly, while I recognise ARAG should have provided Mr S with the policy terms when he asked for them he does appear to have been provided with that information some months earlier. And, while those may have been the incorrect terms, for the reasons I've already explained I think that would have given Mr S the information he needed to understand the relevant provision applying to his claim.

I've gone on to consider whether it was fair and reasonable of ARAG to rely on that term to turn down the claim. The policy says "*We will pay an appointed representative, on your behalf, costs and expenses for the insured incidents in this section as long as: Reasonable prospects exist for the duration of the claim*". The policy goes on to explain that means "*For civil cases, the prospects 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*".

As an insurer isn't a legal expert we don't think it's in a position to carry out that assessment and it should be carried out by a suitably qualified lawyer who has 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 ARAG had agreed (following a negative prospects assessment from the previous panel firm) that counsel's advice should be obtained. And it appointed an alternative panel firm to draft instructions to counsel. I can see those instructions were provided to counsel in July 2024 and his advice was received the following month.

I've reviewed that advice which is extremely detailed (running to 30 pages) and in my view properly reasoned. It clearly explains what counsel considers to be the breaches of duty by the barrister Mr S instructed and (in line with the legal test for negligence) goes on to consider why he's unlikely to establish he suffered loss as a result of them. Counsel is clear the claim "*does not in my view have reasonable prospects (of 51% or more)*".

I'm also satisfied that advice was provided by someone suitably qualified and experienced. Counsel's areas of specialism include professional negligence and (of particular relevance to the claim Mr S was bringing) costs litigation including solicitor client costs. So I think it was reasonable, in principle of ARAG to have relied on this opinion when declining to provide cover for Mr S's claim.

The question is whether it should have done so in the light of the comments Mr S then made about that opinion. In particular he argues there are factual inaccuracies in the opinion as the

evidence shows the underlying proceedings were in the County Court with no appeal rather than High Court proceedings as referenced by counsel. And it wouldn't be appropriate for an insurer to rely on a prospects assessment which contained an obvious factual error or misunderstanding of the circumstances of the case (where that was material to the outcome).

I'm not satisfied that is the case here. Counsel comments in his opinion on arguments Mr S made about jurisdiction and makes clear that in his view the case did progress as part of High Court proceedings. So that is an issue he considered as part of his decision making process. Having said that where a consumer then makes new evidence or arguments following a prospects assessment I'd expect an insurer to seek further advice from an appropriate lawyer on whether this made a difference to the previous opinion.

In this case Mr S appears to have set out in more detail his arguments in relation to jurisdiction after counsel's opinion had been reached. But those were provided to the panel solicitors prior to cover being declined for the claim. They explained why, in their professional opinion, these didn't impact the outcome. The panel firm identified the key issue was whether the identified breaches of duty by the appointed counsel had caused loss to Mr S and said "*I do not think your comments really go that issue of whether or not the breaches caused your loss, which is really the only relevant issue*".

As a legal opinion had already been given on that I don't think there was further action ARAG needed to take when Mr S made the same arguments to it. I think it was entitled to rely on the opinions which had already been provided. I appreciate Mr S has continued to make similar arguments about court jurisdiction to ARAG (and to our service). But he hasn't provided a supportive legal opinion of his own (from a suitably qualified and experienced lawyer) explaining why these make a difference to the prospects of success of his professional negligence claim. In the absence of a supportive legal opinion I don't think there's further action ARAG needed to take in response. And while it's not clear to me whether ARAG explicitly told Mr S it would reconsider matters if he was able to provide such an opinion the panel firm did say he should obtain independent legal advice if he wanted to take matters further. So I think Mr S would have understood the next steps here.

Mr S also says he's made payments based on enforcement action that followed from the incorrect position on court jurisdiction. But whether that's the case or not I don't think it's something which impacts the claim he made to ARAG. That didn't relate to any issues he had with the parties to his underlying claim but was concerned with the professional negligence claim he made against the barrister who represented him (and what, if any, loss he'd suffered as a result of their breaches of duty). Whether other parties had the right to reclaim costs from Mr S isn't directly relevant to the issue he was seeking assistance from ARAG with. As a result it isn't something I'd expect it to have commented on. For the same reasons I don't need to do so as it's not material to the outcome I'm reaching in this decision.

Finally, Mr S says ARAG failed to respond to the complaint he made within the required eight-week period. I don't think that is the case. But even if it is complaint handling isn't one of the activities our rules allow us to consider. So I can't look at in isolation. I could look at it when thinking about the overall customer service ARAG provided but I could only make an award for complaint handling if I was also doing so for something related to customer service more generally. That isn't the case here. So I won't be considering this issue further.

### **My final decision**

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 30 April 2026.

James Park  
**Ombudsman**