

The complaint

Mr S is unhappy with DAS Legal Expenses Insurance Company Limited's handling of his claim under his legal expenses insurance policy.

What happened

Mr S says he was approached by a firm of solicitors (I'll call P) in 2015. They offered him assistance with a claim relating to medical negligence on a 'no win, no fee' basis. Mr S accepted their offer.

P obtained After the Event legal expenses cover for the claim from DAS in April 2016.

P obtained two expert opinions. As a result of the second opinion P concluded that Mr S's claim did not enjoy any reasonable prospects of success. P chose to discontinue to act for Mr S.

Mr S did not agree with the second expert's opinion and complained about it to both DAS and P. DAS forwarded the concerns to P. DAS explained – following Mr S's questions – that he could instruct a different firm of solicitors.

DAS wasn't advised of any new solicitors acting for Mr S; DAS therefore suspended the indemnity and paid P's costs and disbursements to date.

Mr S did try to instruct another firm a few weeks later, in November 2018. There was a discussion about whether the new firm could take up the medical negligence claim, but that firm advised they wouldn't act for him because the time for service expired shortly

During 2021 Mr S complained to DAS about its claim handling. DAS didn't think it had done anything wrong. It explained that as the policy was an After the Event policy it wasn't responsible for P's costs, Mr S had instructed P and it was not responsible for P's handling of the claim.

The investigator didn't recommend the complaint be upheld.

Mr S disagreed with the investigator's view. He said that on our website it says:
However, if a solicitor handled a claim poorly, and you were aware of this but didn't intervene, we may tell you to compensate the policyholder for distress and inconvenience, financial loss, or damage.

He also said DAS was fully aware that the limitation period had expired on the claim but didn't intervene. He was simply left with insufficient time and support to get another unbiased expert report, which is unfair. There was a report available which supported his case for negligence by the general practitioner, but DAS seemingly ignored this. Also, he was cold called by P (who he regards as DAS's agent) at the outset and talked into taking the policy out with DAS, unbeknown to him that the policy would be used by the solicitor to pay for an inaccurate, expert report that lacked a "range" of opinion and was therefore not fit for purpose.

My provisional decision

I issued a provisional decision. In it I said:

Just to be clear I do not have jurisdiction to look at the acts or omissions of P or the experts. P are not DAS's agents they are an independent law firm. I can only look at what DAS has or hasn't done.

The policy taken provides that DAS may end cover under the policy if DAS and Mr S's solicitors agree that it is more likely than not that the claim will be lost.

In this case P advised DAS that following the second expert's opinion Mr S did not enjoy any reasonable prospects of success.

I can understand that this must have been devastating news for Mr S to hear. Mr S felt that the expert was biased and had other concerns about the report produced. DAS was not responsible for choosing the experts. I think DAS responded sympathetically to Mr S's concerns. It raised these with P. And it considered P's reply. But I think it should have gone further, it should have asked for and considered a detailed prospects of success letter. DAS doesn't think it needed to consider this because it wasn't responsible for P's legal fees. I disagree I still think that in order for it and P to agree that it is more likely than not that the claim will be lost it needs to have the detailed explanation. Otherwise it is not agreeing with P it is just going along with P. I appreciate that in this case DAS initially only suspended the cover but this doesn't change my mind about the need for it to see a detailed prospects of success letter from P.

I've considered what would have happened if DAS had asked for a detailed prospects of success letter. It is difficult to say what would have happened without having seen what P had to say. The investigator did ask Mr S to send any such letter he had received to her, but he hasn't yet done so. Given the information I currently have I think it is most likely that DAS would have concluded – after reading a detailed assessment of prospects from P - that it was more likely than not that the claim would be lost. So, I don't think its failure to consider a detailed prospects of success letter changed the outcome of Mr S's medical negligence claim. But I do think the failure to consider a detailed assessment will have caused Mr S some distress given how significant the case was to him. I therefore think – subject to any further comments by either party – that DAS should pay Mr S £100 compensation for the distress caused to him.

Given that the new firm of solicitors which Mr S approached declined to act for him due to the time for service expiring shortly I think it is worth noting that DAS regularly chased P and that as soon as it became aware P would no longer act for Mr S it made it clear to him that he could instruct a different firm of solicitors. I therefore don't think it did anything wrong with regards to ensuring the timeliness of the file management or making clear to Mr S his options.

Mr S may feel this proposed award doesn't reflect the amount of distress he was caused. I don't underestimate how upsetting this all was for him but for the reasons I have said already I think DAS only played a small part in this distress and the proposed award reflects that.

Responses to my Provisional Decision

Neither Mr S nor DAS agreed with my provisional decision.

DAS says it is an insurance company and therefore it is wholly reliant upon the insured's solicitors to provide it with a legal view and inform it whether the case is likely to fail. As an insurer it is not qualified to make such decisions and the solicitors were appointed by Mr S and not DAS, therefore it has no involvement in the legal decision making. It says once P told it they had spoken direct to Mr S and explained to him that based upon the medical evidence they had obtained, they were of the view he no longer had reasonable prospects of succeeding with his claim that was all it needed. It says there was no need to incur further unnecessary legal costs by asking P to provide DAS with a more detailed explanation. Mr S entered into a retainer with P which does not involve DAS and if he disputes the legal assessment, he needs to take this up with his solicitors as DAS did not appoint them or the experts they have relied upon.

Mr S says he has reports confirming that the doctor was negligent. He feels DAS closed its file before he had chance to go to another solicitors and he thinks it was mainly concerned with closing the claim. He thinks DAS has a duty of care and has not treated him fairly. He also says that DAS and P are in partnership and has directed me to a website to show this. He says DAS should be jointly and severally liable for P's actions. He reminds me he was 'cold called' by P and says he was sold a policy not fit for purpose by a partner of DAS. He thinks the nature of the relationship between DAS and P may be why DAS just went along with what P said. He also points out that DAS closed its file 10 days after advising him to see another solicitor. He says by the time he saw another solicitor the file was closed. He says DAS should offer something in the region of £200,000 for not being able to pursue the case.

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.

I understand DAS's points, but I still think it should have obtained a detailed prospects of success letter from P; it doesn't matter that this was an after the event policy or that Mr S instructed P directly. We do not expect insurers to review such letters as though they were qualified lawyers but we do expect them to look at them and consider if they are well reasoned, don't contain obvious factual errors and are written by a legally qualified person. DAS has said there was no need to incur further unnecessary costs by asking P to provide it. I think the costs of such a letter would have been minimal. P may have already provided one to Mr S in which case this could have just been forwarded to DAS. If P hadn't written one, it shouldn't have taken P long to set out an opinion it already had formed.

I also understand Mr S's continued upset about how things turned out. I don't agree that DAS is responsible for the actions of P. P is an independent law firm and whether or not DAS calls its arrangements with law firms 'partnerships' when seeking to work with law firms does not mean DAS is jointly and severally liable for the actions of P.

I don't think the timing of DAS closing its file made any difference to Mr S's case. When he approached another firm of solicitors to act for him, they declined to act for him so it didn't make a difference that DAS's file was closed and in any event the file could have been re-opened if necessary.

I think DAS did try to help Mr S and was sympathetic to him. The only area where I found it should have done something it didn't do was regarding obtaining (or this case not obtaining) the prospects letter. As I said in my provisional decision, I think it is most likely that had DAS received this letter DAS would have concluded that it was more likely than not that the claim would be lost. So, I don't think its failure to consider a detailed prospects of success letter changed the outcome of Mr S's medical negligence claim. But I remain of the view that failing to obtain this letter has caused Mr S distress.

Overall, I am not persuaded to change my mind by the responses from either party to my provisional decision and I confirm it here now.

Putting things right

To put things right I think DAS should pay Mr S £100 for the distress and inconvenience caused to him.

My final decision

I uphold this complaint and order DAS Legal Expense Insurance Company Limited to pay Mr S £100.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 3 May 2022.

Nicola Wood
Ombudsman