

## The complaint

Ms O complains about DAS Legal Expenses Insurance Company Limited's decision to decline a claim she made on her policy for legal assistance.

## What happened

Ms O took out home insurance which included legal expenses cover in 2016. In 2017 she made a claim on that insurance and that claim was declined by DAS. At the time DAS declined the claim because the service charge dispute started before the date of the policy.

Ms O's claim in 2021 was for legal representation to defend county court proceedings brought by the owner of the freehold of her flat for non-payment of amounts towards the service charge and major works totalling over £1,400. The claim form is dated 24 May 2021. She brought the complaint to DAS on 7 June 2021.

DAS said the claim couldn't be covered because it didn't come under the contract disputes section of cover in the policy or the legal defence cover. It told her this two days after the court deadline.

Ms O asked for the decision to be reviewed, and said she'd received legal advice that a service charge dispute was a legally binding contract and fell under the contract dispute/legal defence cover. Prior to taking out the policy, she said she asked the seller of the policy whether a service charge dispute would be covered under the insurance and she said she had been told it would be.

DAS logged a complaint. It requested a copy of the full particulars of claim as it said only the first page had been received.

Ms O said the court paper sent to DAS was the full particulars of claim received from the court.

DAS's final response to her complaint partly upheld it. DAS said the legal expenses section of cover in her policy covered certain legal disputes, but it wasn't all encompassing and was subject to terms, conditions, and exclusions. For a claim to be covered, it had to be established that the event leading to a claim came within one of the insured events set out in the policy. The claim didn't come under the contract disputes cover as a lease was a contract for land and didn't fall within the classification of either a 'good' or a 'service.' It noted she has queried the reference to a 'service' as the dispute related to service charges. However, DAS said that was a responsibility under the contract and not the reason for the contract. The legal defence cover couldn't assist either. DAS said that even though the policy couldn't assist at this stage, a future matter might fall within the cover. And Ms O could still use the legal advice helpline.

DAS upheld Ms O's complaint that further enquiries should have been made as to the time period to which the claim against her related. This hadn't been clarified by the freeholder, but it was thought to relate to service charges for the last financial year. Ms O said she hadn't

been told in a previous claim made in 2017 that the policy couldn't assist with leasehold disputes. DAS said the previous decision could have said that her policy wouldn't be able to assist with leasehold claims. It agreed that her claim should have been prioritised because of the court deadline and she didn't receive a response to her email of 26 June 2021, which had been dealt with in the letter under '*policy cover*.' DAS apologised and said that compensation of £150 would be paid as an apology. Feedback had been given to the department in question.

Ms O remained unhappy and referred her complaint to us. She would like the policy to be honoured and her claim paid as well as compensation. She also has concerns her claim was declined because DAS is the freeholder's insurer.

The investigator didn't recommend the complaint be upheld. She didn't think it was unreasonable for DAS to have declined Ms O's claim under the contract disputes section of cover, because it had to relate to an agreement for the buying or hiring in of any goods or services. The investigator also thought that the claim wasn't covered under the legal defence cover in the policy. She thought the amount of compensation which DAS offered to pay was reasonable as it recognised that there was a delay in coming back to Ms O with the outcome of the claim.

Ms O disagreed. She said DAS at first accepted the claim and only didn't appoint solicitors as agreed after somebody intervened. She said when she contacted DAS in 2017 it said that the only reason it could not accept the claim was because the service charge dispute started before the date of the policy which clearly means that if the claim then was after the policy date, it would have accepted the claim. DAS is, she said, in breach of the policy as there is nothing in the policy wording or exclusions that stated that her claim is not covered, and she was told that it was covered. DAS should honour the policy and pay compensation for the distress, inconvenience and loss suffered as a result. DAS's position that her claim does not come under the contract dispute section of the policy is totally baseless. Service charge is a contract and the provision of services. The policy wording makes it clear that it covers the buying or hiring in of any goods or services. There is no reference to a lease in the policy or its exclusions as DAS seems to suggest.

The investigator issued a second view. She didn't agree that DAS had said it would appoint solicitors. She said a letter was sent to Ms O saying: **if your claim was covered, the next stage was to send it to a lawyer who would assess.** DAS then told Ms O that the claim didn't come within the cover for contract disputes or legal defence, so it didn't get to the next stage where a lawyer would assess whether it had prospects of success.

The investigator also didn't agree with Ms O's interpretation of DAS's letter in June 2017 regarding her previous claim. She thought it didn't automatically mean that the claim would have been accepted if it had related to events occurring after the policy date. She also didn't agree that Ms O's claim was covered. She said under the contract disputes cover, the dispute had to arise from an agreement for '*goods or services*.' But, a lease isn't classed as a good or service - the ordinary meaning of a lease is a conveyance or grant of the possession of property to last during the life of a person or for a term of years or other fixed period, with the reservation of a rent.

Ms O has asked for an ombudsman's decision. She said:

- it is the case that DAS accepted the claim and in a telephone conversation it asked her whether she wanted it to appoint a solicitor or whether she want to appoint the solicitor. She says they agreed that DAS would appoint a solicitor for her. The next time she heard from DAS was when the court date to file a defence had elapsed and she contacted it again. DAS knew the date required by the court to file a defence, it agreed to appoint a solicitor for her over the phone but did not bother. It is totally

unreasonable to behave in this manner to say the least. This action by DAS was because of an intervention by somebody and she has now found out that DAS has a relationship with the freeholder as underwriters which raises serious questions of conflict of interest.

- her claim should be covered under the policy. She thinks that DAS deliberately cut off part of the policy wording in its correspondence and this should speak volumes.
- she was told the only reason her claim was declined in 2017 was because the dispute started before the policy started. She says this means that the service charge dispute is covered, and DAS has always known this.
- when she bought the policy, she was told a service charge dispute would be covered.

## My provisional decision

I set out a provisional decision. In it I said:

*DAS did not sell the policy so I cannot make any finding about the sale of the policy in this decision. The policy was sold to Ms O by another business. Ms O has also brought a complaint about that business. This decision is not about the actions of that business and so I make no decision about the actions or omissions of that business.*

### Is Ms O's claim covered under the terms of the policy

*Given this is a service charge dispute there are three sections of the policy which are most relevant. These are contract disputes, property protection and legal defence.*

*Looking at these in reverse order. The legal defence section doesn't help Ms O because it is concerned with defences relating to an event arising from the insured's work or their prosecution for an offence connected with the use or driving of a motor vehicle.*

*In the property protection section, there is a specific exclusion for:*

- *The enforcement of a covenant by or against **you** (meaning the enforcement of an agreement **you** have entered into in connection with land **you** own).*

*As a service charge dispute will concern the enforcement of a covenant in a lease then this exclusion will mean the service charge dispute wouldn't be covered. Even if I was wrong, I don't think Ms O's claim would be covered in any event. I've explained why below.*

*Ms O thinks she is covered under the contract disputes section of the policy.*

*This says:*

**We will cover the costs and expenses for the following:**

- **Your or your family's** legal rights in a contractual dispute arising from an agreement or an alleged agreement which **you** or **your family** has entered into for: -The buying or hiring in of any goods or services; or the selling of any goods.
- **Your** legal rights in a contractual dispute or for misrepresentation arising from an agreement or alleged agreement which **you** have entered into for the buying or selling of **your principal home**.

*Provided that:*

- **You** and **your family** has entered into the agreement or alleged agreement during the **insurance period**.

- The amount in dispute is more than £100.

*I read the words 'provided that' as applying to both the sub clauses above. So, for Ms O's service charge dispute to be covered Ms O would need to have entered into the agreement giving rise to the service charge dispute during the insurance period. The agreement giving rise to the service charge dispute is her lease. The insurance period is defined as: The period for which **we** have agreed to cover **you**. The insurance is an annual insurance policy running from April to April and was first taken out in 2016. We know that Ms O had a service charge dispute which began prior to the insurance being taken out so the lease must pre-date the insurance. Therefore, Ms O's service charge dispute is not covered.*

*I also don't think Ms O's service charge dispute is covered because I agree with the investigator that a service charge dispute can't be fairly characterised as an agreement for the buying or hiring in of any goods or services, or the selling of any goods. It is primarily a property dispute and the service charge element of the lease is clearly secondary to the main purpose of the contract which is to convey land.*

*I think it is arguable that a service charge dispute might be a dispute arising from an agreement entered into for the buying or selling of your principal home. But I think the requirement that the agreement be entered into during the insurance period means that the service charge dispute isn't covered here so I don't need to consider how this clause and the clause I referred to above regarding covenants interact.*

*Taking all the above into account I don't think Ms O is covered and I therefore don't think it was unfair of DAS to decline her claim.*

#### The 2017 claim

*When Ms O first brought a claim to DAS regarding service charge disputes DAS declined the claim saying that the claim began before your policy started and so DAS would be unable to assist. DAS has accepted that it could have told Ms O she wouldn't be covered in any event. I agree this would have been helpful. I don't agree with Ms O that what DAS said means that there were no other reasons for declining the claim. As the investigator explained in detail there are stages that have to be gone through before a claim is accepted. I think if Ms O read DAS's email as saying she would have been covered but for the claim being before her policy started then she over interrupted the letter and I don't think I can hold DAS responsible for that.*

*Ms O says that had she been told that she wouldn't be covered for service charge disputes when DAS declined her claim in 2017, she would have ended her current policy and taken out cover with another insurer. I haven't seen anything which makes me think DAS knew that she wouldn't have kept her insurance cover if she had known she wouldn't be covered for service charge disputes. Ms O could have asked DAS when she made her claim if service charge disputes were normally covered and if so, would any future claim by her be likely to be covered. I can't see any evidence that she did this. So, I don't think it would be fair to hold against DAS Ms O reading too much into its letter.*

#### Delays in notifying Ms O

*DAS has accepted Ms O's claim should have been prioritised. It has offered her £150 which Ms O hasn't accepted. She says she was told that DAS would appoint a solicitor for her, and she didn't find out one hadn't been appointed until after the court deadline. Ms O has said this was very traumatic. I don't think it was likely Ms O was told that a solicitor would be appointed. I believe she thinks this, but I think she's mistaken. I do think it would have been*

*stressful to discover DAS didn't respond to the court proceedings in time. Ms O has said her case is on-going so it doesn't seem to have affected the case long-term, but it must have been upsetting at the time particularly as she presumably didn't realise it wouldn't have long-term consequences. In these circumstances I think £300 compensation would be fairer.*

### **Alleged bad faith of DAS**

*I haven't seen anything which leads me to believe DAS hasn't acted in good faith here. It did only include a section of the insurance contract in its correspondence with Ms O but both Ms O and I have done the same. All of us have, I think, selected as much of the policy as we think we need to explain our point and nothing more. I also haven't seen any evidence that those involved in looking at Ms O's claim were even aware that DAS might have a relationship with the freeholder.*

### **Responses to my provisional decision**

DAS had nothing to add to my provisional decision.

Ms O didn't accept my provisional decision. She set out at length why she disagreed with it. In summary she said:

- Her claim should be covered both under the property protection section of the policy and the contractual dispute section.
- The policy makes it clear that it will cover her legal rights in a contractual dispute. A service charge dispute is a contractual dispute. The policy also states that the agreement has to be during the insurance period. The service charge dispute is a contract within the insurance period because it is a contract that runs annually from 1 April each year to the 31 March. She quotes the Landlord and Tenant Act 1985 to support her view that a service charge relates to services.
- A lease is not ownership of land because the leaseholder does not own the land.
- DAS is responsible for the selling of the policy as it gave the business which sold the policy actual and ostensible authority.
- Cutting off part of the policy wording, as DAS did in its letter of 25 August 2021, is an act of bad faith.
- She doesn't think I should have said 'even if I am wrong' in my provisional decision.
- Ms O says that DAS's email declining her claim in 2017 was very clear and there was no other reason for declining the claim. If DAS had been up front, then she would have closed the insurance straightaway without delay.
- She maintains she was told by DAS that a solicitor would be appointed.

### **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.

#### **Is Ms O's claim covered under the terms of the policy?**

Ms O says she is covered under the property protection section of the policy. Under this section there are a number of specific exclusions One is:

- *The enforcement of a covenant by or against **you** (meaning the enforcement of an agreement **you** have entered into in connection with land **you** own).*

Ms O says she doesn't own land. She says she is a tenant and does not own the land but pays ground rent. In England land can be owned with a freehold or a leasehold interest. I

agree that Ms O doesn't own the freehold interest in her flat. She does, however, own the leasehold interest. The fact that she pays a ground rent doesn't negate her ownership of the interest. As a service charge dispute will concern the enforcement of a covenant in a lease then this exclusion will mean the service charge dispute wouldn't be covered.

One of the other exclusions applicable to the property protection section is for: *Any claim relating to ... A contract entered into by you*. As Ms O is the tenant and the claim relates to the service charge on her lease then this exclusion would seem also to apply.

So, I don't agree that Ms O's claim is covered under the property protection section of the policy.

Ms O says she is covered under the contract disputes section of the policy. She says a service charge dispute is a contractual dispute. Further that it is an agreement entered into for the buying or selling of her principle home. And that it is concerned with the provision of services. She says the policy states that the agreement by her has to be during the insurance period. And the service charge dispute is a contract within the insurance period because it is a contract that runs annually from 1 April each year to the 31 March.

The clause in the policy says however the agreement has to be entered into during the insurance period. And we know that she didn't enter into the agreement which led to the dispute during the insurance period because she had a service charge dispute which pre-dated the insurance policy, so Ms O's service charge dispute is not covered.

I also don't think Ms O's service charge dispute is covered because I remain of the view that a service charge dispute can't be fairly characterised as an agreement for the buying or hiring in of any goods or services, or the selling of any goods. It is primarily a property dispute and the service charge element of the lease is clearly secondary to the main purpose of the contract which is to convey land.

Taking all the above into account it remains my view that Ms O's claim isn't covered, and I therefore don't think it was unfair of DAS to decline her claim.

I appreciate that Ms O says that she was told a solicitor would be appointed by DAS. I have listened to the only call recording DAS has been able to provide. In it the DAS call handler did say: 'Are you happy for us to find [a] solicitor to act for you?' but he immediately followed this up with 'assuming we can cover you'. Unfortunately, I haven't been able to listen to any other calls between DAS and Ms O. I've thought about what I would have done if DAS had made an error and said that it would appoint a solicitor to act for Ms O. I think given Ms O wasn't covered for the reasons I've set out above that it wouldn't be reasonable of me to hold DAS to any such error. I would look to compensate Ms O for the disappointment caused by the error but looking at the compensation I set out in the provisional decision I think this would remain a fair amount. So, I wouldn't expect DAS to anything more.

#### Is DAS responsible for the sale process?

I do not agree that DAS is responsible for the sale process. If Ms O was mis-sold the policy, it would be the seller who was responsible. Ms O has brought a separate complaint about the seller and this will be considered in the decision about the seller.

#### The 2017 claim

I remain of the view that it would have been helpful if DAS had made it clear that a service charge claim wouldn't be covered. But as I don't think DAS had any reason to believe that

Ms O would have cancelled her policy if she had known these disputes weren't covered, I don't think it would be fair to hold DAS responsible for Ms O continuing with the policy.

#### Delays in notifying Ms O

I also remain of the view that DAS should have prioritised Ms O's claim. And that the compensation it has offered is too low. I think £300 remains fair compensation for the upset caused. I appreciate Ms O feels DAS has caused her unnecessary anxiety, trauma and stress. As I think DAS wasn't unreasonable to decline her claim I am looking to compensate her for the delay in declining the claim rather than for the effect on Ms O of having her claim declined. And in that context, I think £300 is fair.

#### Alleged bad faith of DAS

I appreciate that Ms O maintains that DAS has acted in bad faith particularly when setting out parts of the policy in a letter to her. As I said in my provisional decision, all of us DAS, Ms O and me, have selected parts of the policy when explaining our points and we have all, I think, selected as much of the policy as we think we need to explain our point and nothing more. I also haven't seen any evidence that those involved in looking at Ms O's claim were aware that DAS might have a relationship with the freeholder. I don't think DAS has acted with bad faith.

Finally, I am sorry that Ms O was shocked and disappointed that I said 'even if I was wrong' in my provisional decision. The point I was trying to make was that a service charge claim failed as a result of more than one part of the policy and that I didn't need to rely on the words of the property protection section to conclude she wasn't covered.

#### **Putting things right**

For the reasons set out above I think DAS should pay Ms O £300.

#### **My final decision**

I uphold this complaint in part and order DAS Legal Expenses Insurance Company Limited to pay Ms O £300.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms O to accept or reject my decision before 15 September 2022.

Nicola Wood  
**Ombudsman**