

The complaint

J, a charity, is unhappy with what DAS Legal Expenses Insurance Company Limited did after it made a claim on its legal expenses insurance policy.

What happened

J's supplier made a claim against it for unpaid charges. J sought assistance under its legal expenses policy to defend the claim. DAS asked panel solicitors whether the defence would have reasonable prospects of success. Their view was it didn't. In April 2021 J obtained counsel's opinion which found the defence claim would enjoy reasonable prospects of success. But the opinion said the supplier's power to charge was derived from statute and not contract and "*there is no contract between the Claimant and the Defendant*".

DAS said the claim was being considered under the contract disputes section of the policy. As counsel had concluded the matter arose from statutory rather than contractual rights it didn't believe an insured event under the policy had taken place. It turned down the claim on that basis. A complaint about that decision has previously been considered by our service. Our investigator thought DAS acted fairly. That complaint is closed.

In December 2021 J provided a fresh counsel's opinion which said there was a contractual dispute between J and its supplier; counsel concluded "*the claim is an insured event and is covered by the policy*". DAS asked a different panel firm to consider that further.

In March 2022 J made a further complaint because it was unhappy with lack of progress on the matter. Our investigator issued his view in August 2022. He was satisfied J had now shown an insured event under the policy had taken place. He thought if DAS wanted to challenge the legal advice J obtained it should have obtained its own counsel's opinion. He said DAS should either accept and progress the claim under the terms of the policy or obtain an alternative counsel's opinion if it wanted to dispute those obtained by J. And he said it should pay J £200 to recognise the inconvenience it had been caused.

DAS agreed to the suggested compensation. And it confirmed panel solicitors would instruct counsel to provide an opinion. However, as there were then further delays in action being taken, J asked for an Ombudsman to review matters. 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.

First, I appreciate this matter has been ongoing for some time. However, in this decision I'm considering what happened after J made a fresh complaint to us in February 2022. I've looked at the terms and conditions of its legal expenses policy and I don't think it's in dispute the only part of cover this claim could potentially fall under is the "contract disputes" section. And the onus is on J to show an insured event has taken place.

I think it's now done that because it's obtained a properly reasoned counsel's opinion which unequivocally concludes there is a contractual dispute and the terms of the policy are met. If DAS wanted to challenge that I agree it should have sought an alternative counsel's opinion rather than referring the matter to panel solicitors for them to review.

But I'm not sure that's a current issue because the panel firm said in June 2022 "*we consider the claim against the policyholder by the third party to be one under breach of contract, specifically a deemed contract and not one of which arises under statute*". However, it said further investigations would be necessary before confirming an assessment of prospects and that counsel's opinion would be sought on this.

The policy requires that "*reasonable prospects*" exist for any claim. It says that means "*for civil cases, the prospects that the Insured Person will...make a successful defence...must be at least 51%*". In this case J did obtain counsel's opinion (in April 2021) which confirmed the defence of the claim met that term. That opinion was provided to the panel solicitors who initially considered the claim and they were satisfied it could be relied on.

However, when the current panel firm asked J for a copy of the advice in March 2022 J indicated it wasn't prepared to provide this prior to DAS having accepted the claim. It's this issue which appears to have now prevented the claim moving forward and a further counsel's opinion on prospects being obtained.

I've thought about whether there was more DAS should have done to assist with this issue; for example whether it should have provided a copy of the prospects assessment with its instructions to the solicitor. But I'm not clear whether DAS had a copy of that opinion. The original panel solicitors refer to it being passed to them but I can't see any record of that contact on the file DAS provided. And while J has suggested DAS and the original panel firm are the same business that isn't the case; they have separate company registrations and different regulators.

In any event at the point the matter was referred to the new panel firm some months had passed since the original prospects assessment was completed. Given the requirement for a claim to have reasonable prospects of success is an ongoing one I think DAS would have been entitled to ask for a revised assessment at that point to check nothing had changed. In fact I can see in correspondence with us J said it would be happy to obtain a revised assessment if that was required.

But that hasn't happened and matters appear to have reached an impasse, possibly caused by confusion over terminology. As I've said it no longer appears to be in dispute an insured event has taken place as both counsel and the panel firm are in agreement on this. So the claim is one that J's policy would cover; the question is whether the requirement it enjoys reasonable prospects of success has been met. And although that was previously confirmed, as I've said, I think DAS is entitled to seek an up to date assessment on this before confirming cover (particularly as I understand the underlying legal case has now moved on).

I've thought about what the right way to resolve this complaint is. I'm mindful of the fact that it's not our role to become involved with ongoing claims handling. I think issues that have arisen after our investigator issued his view will need to form part of a fresh complaint if J is unhappy with what happened since then. But I do need to take into account what the current situation with the claim is in order to make directions for the resolution of this complaint that are both practical and achievable.

I agree with our investigator there have been some failings in the period I'm considering which it's reasonable to say DAS is responsible for. For example, if it wanted to challenge the opinion on policy coverage J had obtained it should have sought an alternative counsel's opinion on this. But I think £200 is the right amount to recognise the inconvenience that caused J and DAS has agreed to pay that.

The outstanding issue is whether the claim enjoys reasonable prospects of success. J did obtain a positive opinion on that but it's now nearly two years old and I think it would be reasonable for an updated opinion to be obtained. If DAS is prepared to accept that from J's counsel it should obtain and pay for that. If it isn't then it will need to obtain and pay for an opinion from an alternative counsel.

If prospects for the claim are then confirmed DAS will need to cover it in line with the remaining terms and conditions of the policy. It will also need to consider what cover should be provided for legal costs J has already incurred. If J is unhappy with the decisions that DAS then makes then that's something it could raise as part of a fresh complaint.

DAS will also need to pay J £200 if it hasn't already done so.

My final decision

I've decided to uphold this complaint. DAS Legal Expenses Insurance Company Limited will need to put things right by doing what I've said in this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask J to accept or reject my decision before 5 April 2023.

James Park
Ombudsman