

The complaint

Mr and Mrs S's complaint is about a claim they made on their DAS Legal Expenses Insurance Company Limited ('DAS') legal expenses insurance policy.

Mr and Mrs S say that DAS have treated them unfairly.

What happened

Mr and Mrs S made a claim on their DAS legal expenses insurance policy for cover to defend a claim made by their neighbour.

They appointed their own choice of Solicitors to act for them. Those Solicitors sought funding from DAS for their costs in defending the claim.

The parties are aware of the detailed history surrounding the claim and the facts of that history are not in dispute, so I won't repeat them in detail here. In summary, Mr and Mrs S' own Solicitor's costs couldn't be agreed for some time by DAS. Eventually the trial of the claim took place in July 2018 at which Mr and Mrs S were successful. A costs order was made in their favour. Following that the neighbour offered to settle the order for costs. Mr and Mrs S' Solicitor's asked DAS whether to accept the offer made on the basis it was a reasonable offer. DAS endorsed this.

Mr and Mrs S say their costs amounted to £135,000 and the offer made against this was for £80,000. They say they accepted the offer on the basis that they thought DAS would pick up the shortfall under their policy, but DAS have since refused this. They're also concerned that even if DAS did agree to pick up the shortfall, their indemnity limit isn't as much as they were led to believe. They rely on a representation made by DAS in July 2017 in which their Solicitors were told the limit amounted to £250,000 in error. This was later corrected by DAS who confirmed the correct limit of indemnity was £50,000. Mr and Mrs S say that they still need the benefit of cover because they're still dealing with a claim that has arisen out of the previous one made against them and so still falls into the same original limit of indemnity.

Our investigator considered Mr and Mrs S' complaint and concluded it should be upheld. He said that DAS should pick up the shortfall of the costs Mr and Mrs S have been left with, up to the indemnity limit of £50,000, provided those costs are reasonable. In doing so, he said that DAS were entitled to assess the remaining costs and pay those that are reasonable, in line with the hourly rates they agreed with Mr and Mrs S's Solicitors. In addition, he said DAS should pay interest of 8% per year simple on any amounts Mr and Mrs S have already paid to their Solicitors that are yet to be recovered from DAS from the date they were paid, until DAS reimburses them for this. Finally, the investigator said that any remaining indemnity available under the policy should be retained by DAS to allow Mr and Mrs S to pursue the related claim they've referred to, subject to the remaining policy terms.

Neither DAS or Mr and Mrs S agree with the investigator's view. DAS say that the purpose of the policy is to pay reasonable and necessary costs and the costs that remain unrecovered are not reasonable and necessary- because Mr and Mrs S accepted a reasonable offer on them. They feel that if the investigator's view stands, this would lead to betterment under the

policy because the insurance doesn't cover this kind of situation. They also say they've discharged their duty to Mr and Mrs S.

Mr and Mrs S are unhappy because they don't think the investigator's findings go far enough. They want DAS to push the indemnity limit up to £100,000 because of their original reference to the indemnity limit being £250,000. This would mean that DAS pick up the shortfall of their costs and that they have enough available to them to pursue the other claim under the terms of the policy. They also say DAS shouldn't be entitled to assess the remainder of their costs as they will only reduce them and this would mean Mr and Mrs S will be left with a liability to pick up themselves, which is unfair. They feel the costs they've incurred have already been assessed by the Court, so this means they are reasonable.

Because of this the matter has been passed to me to determine.

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.

Having done so, I agree that Mr and Mrs S's complaint should be upheld in the same way set out by the investigator. I'll explain why.

I've provided a summary of the facts of this complaint as well as both parties' submissions. No disrespect is intended to either party in this regard. It simply represents the informal nature of this Service. I can however assure them both that I've considered everything they've said when reaching my conclusions.

Where a party has recovered costs in a successful claim against another party, we have an established approach about any shortfalls in costs that then fall to the policyholders to pick up where legal expenses insurance cover is in place. I appreciate DAS don't agree with that approach but that doesn't change where we stand.

Like most legal expenses insurance policies, Mr and Mrs S's policy says there is only cover for a non panel Solicitor's fees from the point where it's necessary to issue court proceedings. Mr and Mrs S opted to use a Solicitor of their own choice and sought cover for this from the point of issuing proceedings.

Whilst there was disagreement over the terms of appointment, that matter has now been resolved and DAS agreed to pay Mr and Mrs D's costs at agreed hourly rates. There was also disagreement about the indemnity limit applicable to the policy given an earlier representation by DAS that this amounted to £250,000. It's not in dispute that the correct limit applicable to the policy is £50,000. I don't intend to address any submissions about whether that should be altered in this complaint because the issue concerning the indemnity limit was the subject of another complaint to this Service that Mr and Mrs S agreed to settle.

Part of that settlement included accepting the correct indemnity limit applicable to the claim. So based on the fact that the indemnity limit is £50,000 and that matter has already been agreed separately, DAS are only responsible for paying Mr and Mrs S's reasonable costs at the agreed rates up to that amount.

DAS say that they're not obliged to pay anything in respect of Mr and Mrs S's costs because £80,000 of these were recovered from their neighbour. But I don't think that's the right way to approach this. The policy covers Mr and Mrs S for:

“all reasonable and necessary costs chargeable by the representative on a standard basis,

or in accordance with the Predictable Costs scheme, if this is appropriate.”

The policy terms also say:

“If an insured person does not accept a reasonable offer to settle a claim we may refuse to pay further costs and expenses.”

Mr and Mrs S must *“take every step to recover costs and expenses that we have to pay, and must pay us any costs and expenses that are recovered”*

Looking at the policy terms and based on the terms of appointment agreed with their Solicitors, Mr and Mrs S have cover for costs up to £50,000 at the hourly rates agreed with DAS. So, they're entitled to claim costs up to that limit. But they were obliged to accept a reasonable offer to settle their claim- which I interpret as applying to costs orders as well as the main claim, as DAS has - otherwise DAS could refuse to pay any further costs or expenses. The policy also required them to recover costs DAS were responsible for and pay these to DAS. That's not unusual. The purpose of this type of policy is to cover Mr and Mrs S for any costs they don't recover from the other side. So, any costs recovered will be deducted from their indemnity limit and they can claim the balance.

In this case, Mr and Mrs S recovered £80,000 but that wasn't enough to cover all their costs; there's a shortfall of £55,000. The same principle applies here – they're entitled to claim those costs. It wouldn't be fair if they're paid nothing because they reduced DAS' liability by recovering costs from the other side – particularly where the settlement was agreed with DAS' approval.

That doesn't necessarily mean DAS have to pay the £55,000 in full. They're entitled to assess the costs to see what's reasonable and pay them in line with the rates agreed with Mr and Mrs S's Solicitor. I don't think this amounts to betterment under the policy as DAS contends. The alternative, in my view leaves Mr and Mrs S with no benefit from their insurance policy at all. A policyholder would generally expect that, subject to anything recovered from the other side, the policy will cover their costs – that is the point of having the cover and not just to cover the risk of picking up costs if the other party doesn't pay them. So, I think it's fair and reasonable for DAS to pay Mr and Mrs S's costs up to the policy limit after deducting the £80,000 paid by the neighbour.

I've also thought about what Mr and Mrs S have said about these costs particularly on the question of assessment. In particular, they say their costs were assessed by the Court and so this assessment should be sufficient. I haven't seen anything that confirms that a detailed assessment of costs was undertaken by the Court. From what I've seen it looks as though a bill was prepared by Mr and Mrs S's Solicitor, but this isn't the same as a detailed assessment of costs. And neither is a summary of intended costs that was presented to the Court earlier on in the proceedings, which seems to be what Mr S is referring to.

Although I appreciate Mr and Mrs S have accepted a lower sum in settlement of their costs, this doesn't mean the amount they were claiming would have been accepted by the Court as reasonable. So, in the same way the Court might have assessed costs, DAS is now entitled to assess them on a standard basis and in line with the rates they agreed with their Solicitors. I appreciate this might mean Mr and Mrs S are left with some shortfall to fund themselves, but that's the risk they took when instructing their own Solicitors to act for them. The policy only covers reasonable and necessary costs charged on a standard basis. I can't expect DAS to pay anything beyond that. If Mr and Mrs S disagree with DAS's assessment of their costs, they are entitled to obtain their own evidence in the form of a cost draftsman's report to help resolve things. If they do this, I would expect DAS to consider that report and if matters can't be agreed, the issue can be determined by way of an application to Court if

necessary.

As I've set out above, I don't intend to deal with the mistake DAS made in relation to the level of indemnity they confirmed was applicable to the policy because this was the subject of an earlier complaint which has now settled. Equally I won't be dealing with delays or the difficulties Mr and Mrs S in getting DAS to agree to fund their costs in principle for the same reasons.

Mr and Mrs S have however made a new assertion that a limit of £100,000 should be applicable to the policy so that it covers the shortfall of their costs and the additional claim that stems from the same cause of action. Although DAS initially made a mistake about the limit of indemnity, I won't in this case be looking behind the correct limit of £50,000 because that is what's applicable to this policy.

Putting things right

To put things right DAS:

- should consider Mr and Mrs S's total costs and pay those reasonably and necessarily incurred on a standard basis up to the limit of indemnity at the rates agreed with their Solicitors.
- is entitled to set off the £80,000 paid by Mr and Mrs S's neighbour against the total costs assessed as reasonable and necessary on a standard basis.
- can have Mr and Mrs S's total costs assessed to determine what is reasonable and necessary on a standard basis. If Mr and Mrs S don't agree they will be entitled to obtain their own assessment from a cost draftsman. I would expect DAS to consider this assessment. If the matter still can't be agreed, then it can be determined by way of an application to Court.
- should pay Mr and Mrs S interest at 8% per year simple on any costs they pay them from the time they were paid by Mr and Mrs S until they're discharged.
- Retain any remaining amount of indemnity for the other claim Mr and Mrs S wants to bring, subject to the remaining policy terms.

My final decision

For the reasons set out above, I uphold Mr and Mrs S's complaint against DAS Legal Expenses Insurance Company Limited and direct them put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S and Mrs S to accept or reject my decision before 12 September 2023.

Lale Hussein-Venn
Ombudsman